Homelessness and the law

Vonk, G.J.; Tollenaar, Albertjan

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Constitution, criminal law and human rights

G.J. Vonk & A. Tollenaar (eds.)

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Preface

This book brings together a selection of the best papers written by Groningen law students who participated in various courses on homelessness and the law in the academic year of 2013 and 2014 at the Law Faculty of Groningen University in the Netherlands. They include exchange students from different countries following the course on International and Comparative Social Security Law (Vonk), Dutch students following the master course Socialezekerheidsrecht (Vonk) and Dutch students following the Research Master (Tollenaar). We are greatly indebted to all these students for their enthusiasm and hard work for a good cause!

Gijsbert Vonk and Albertjan Tollenaar

Groningen, 10 February 2014

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Part I
Introduction

Chapter 1
Homelessness and the law: a general introduction

Gijsbert Vonk

1 Introduction

'This was a vagrant of sixty-five, who was going to prison for not playing the flute; or, in other words, for begging in the streets, and doing nothing for his livelihood. In the next cell, was another man, who was going to the same prison for hawking tin saucepans without a licence; thereby doing something for his living, in defiance of the Stamp-office.'

This quote is taken from *Oliver Twist*. Ever since Dickens - a former law clerk with a keen eye for the social questions of his time - wrote his great novels we know that there is a connection between law and homelessness. And it has not always been a good one. Vagrancy was a criminal offence, the poor house was bleak. Especially during the 19th century, a period during which the state had largely withdrawn from society and many traditional forms of care had eroded under the influence of the industrial revolution, homelessness and poor law dependency were a terrible ordeal for the people involved.

'To be shelterless and alone in the open country, hearing the wind moan and watching for day through the whole long weary night; to listen to the falling rain, and crouch for warmth beneath the lee of some old barn or rick, or in the hollow of a tree; are dismal things - but not so dismal as the wandering up and down where shelter is, and beds and sleepers are by thousands; a houseless rejected creature.'[1]

During the course of the 20th century the conditions improved. Work houses for the poor were abolished and new measures were increasingly aimed at prevention, protection, support and integration the homeless in the society. Poverty became a subject of social policies and homeless a concern for the welfare state. With this, the function of the law changed from repression to a more positive agenda offering a legal infrastructure for social housing programmes, social benefits and support services. The foundation for this welfare state infrastructure is laid in the constitutions of most developed states. Yet also in contemporary welfare states the function of the law is

[1] Taken from Dickens, *Barnaby Rudge*, Chapter IV.

never fully inclusive and emancipatory. Limitations and restrictions apply, in particular for immigrants with foreign nationality. States impose impose not only immigration law restrictions on persons with insufficient resources, but also limit access to social benefits for those with a weak immigration status. This intensive 'mutual embrace' between immigration law and welfare law is even kept largely in place in EU-law on the rights of mobile citizens. The overall message remains that it is not the host state but the state of origin which should look after its own citizens. Interestingly, as we will discuss below, similar exclusions which apply to foreign nationals are now also on the rise for national outsiders of local communities, who do not have sufficient local connection. In this way, both for nationals and for non-nationals law may operate as an instrument of exclusion. Moreover, it must be borne in mind that a repressive response to destitution and homelessness has not fully disappeared, some would even argue to the contrary. In any case while in most countries vagrancy has been abolished as a criminal offence, it is still possible for towns to enact bylaws, prohibiting loitering in the public spaces, public drinking, begging etc. Such bylaws are enforced in the name of public order by the arm of the police which can impose fines and arrest people. This has a direct impact on the position of the homeless. In the meantime, human rights are there to soften the most severe consequences of legal exclusions and repressive practices. All countries have had their landmark cases in which the judiciary offered a human rights remedy to persons who are left without protection. This shows that homelessness creates a curious paradox in our legal order: the same system which is responsible for exclusion (in terms of legal restrictions to access the welfare state) and repression (terms of repressive legal responses to destitution and homelessness) calls for the protection of those who are excluded and repressed (human rights law).

The purpose of this contribution is to further elaborate on the relationship between homelessness and the law, thereby simultaneously introducing the various chapters which are contained in this book. The above sketch of this relationship already touched upon the four issues around which both this general introduction and the structure of the book are centred, i.e.:

- homelessness as a constitutional challenge (to what extent is combatting homelessness a constitutional imperative and which levels of government are involved?);
- homelessness, public order and criminal law (repressive legal responses to homelessness);
- homelessness and immigration (access to housing and social benefits for immigrants); and
- human rights responses and access to justice (landmark cases and possibilities for the homeless to access the protection of the judiciary).

Below in Sections 2 to 5 I shall pay some attention to the nature of these subjects with reference to a) relevant legal issues and b) to the major policy challenges arising from these legal issues. Analysing the relationship between law and the homelessness is one thing, coming up with ideas for improvement of this relation another. Therefore, the last part of this chapter - Section 6 - is devoted to some ideas for strengthening the legal position of the homeless, using the EU as a platform.

Finally on a conceptual note: for the purposes of this book we use the European Typology of Homelessness and Housing exclusion (ETHOS), developed by the European Federation of national organisations working with the homeless (Feantsa).[2] This ETHOS typology takes into account physical, social and legal aspects of a 'home', and classifies homeless people according to four main living situations, i.e. rooflessness, houselessness, living in insecure housing, and living in inadequate housing.

2 Homelessness as a constitutional challenge

2.1 Legal issues

As it appears most countries address the question of poverty and social welfare as a constitutional concern. It does so primarily by recognizing the responsibility of the state for the social security and housing of its citizens, by means of socio-economic fundamental rights. Indeed, the constitutions of all the European countries and many countries elsewhere, include such rights, with a notable exception of the UK which does not have a written constitution.[3] There is much conflicting opinion what these socio-economic fundamental rights mean, but the final responsibility of the state for the social welfare of its citizens cannot easily be challenged. Social security and housing are a public concern, and if the system fails, it is the state that can be held accountable.[4] If this applies for the general social welfare state a large, surely it applies even more for the protection of the homeless, who are at the bottom of ladder of vulnerability.

Incidentally, recognizing housing and/or social security as a constitutional imperative does not necessarily mean that it can be invoked as such successfully in court. In chapter 4 Elizabeth Perrault describes a judgement

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2 Well documented on <www.feantsa.org>.

3 Cf. Katrougalos G.S. 'The implementation of social rights in Europe, *The Colombia Journal of European Law* 1996, p. 277-312.

4 Cf. G.J. Vonk & G.S. Katrougalos, 'The public interest and the welfare state, a legal approach', in: G.J. Vonk & A. Tollenaar (eds.), *Social security as a public interest, a multidisciplinary inquiry into the foundations of the regulatory welfare state,* Antwerpen: Intersentia 2010, p. 75.

of the Superior Court of Ontario of September 2013 in a case brought up by four individuals and several organisms against both the federal and the Ontarian government to get them to implement policies to reduce and eliminate homelessness and inadequate housing. The claim was rejected on grounds of arguments relating to the separation of powers between the administration and the judiciary: the matter was deemed to be too political.

Homelessness is not only a constitutional subject from the point of view of socio-economic fundamental rights, but from the point of view of the internal state organisation. What is the division of power between the central, regional and local level? Clearly in confederations such as Switzerland, this is an important question (cf. Chapter 10 by Delphine Poussin), but also for unitary states such as the Czech Republic it appears that the co-operation between the various layers of government is a major point of concern. Here the first national programme on preventing and combating homelessness in the Czech Republic, was adopted in August 2013 and updated in November 2013 to target the homeless and to help those at risk of losing their accommodation (Chapter 3 Katerina Benasova). But as by their very nature services for the homeless must be delivered at the local level, national programmes such as these invariably involve a system of multilevel governance. It is for this reason that in chapter 2 Albertjan Tollenaar, in his overall introduction on homelessness and the constitution, arrives at the conclusion that the legal infrastructure regarding the homeless is based on a constitutional framework where central and local governments have to work together (Chapter 2). Homelessness then becomes a problem of 'governance'.

Actually, the latter observation also applies for the relationship between the member states and the EU. Apart from the interferences following from the EU regime on the freedom of movement of persons, the fight against homelessness still rests firmly the member states themselves. A legal basis for any binding EU-measures in the field is shaky, according to some entirely absent.[5] However this does not mean to say that the member states cannot work together in this field and the EU Commission cannot facilitate and promote such co-operation. By doing so, the member states can learn from each other and hold each other accountable for any lack of progress made in this field. Indeed, the EU Commission has now set the first steps towards such common strategy against homelessness as part of the so called Social Investment Package.[6] Such initiatives are part of the total multilevel governance structure for combatting homelessness.

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5 H. Verschueren, 'Union law and the fight against poverty: which legal instruments?', in: B. Cantillon, H. Verschueren & P. Ploscar (eds.), *Social inclusion and social protection in the EU : interactions between law and policy*, Antwerpen: Intersentia 2012, p. 208-201.

6 European Commission, *Combatting Homelessness in the European Union,* Brussels: SWD 2013, 342 def.

2.2 Policy challenges: local dumping

In Chapter 2 Albertjan Tollenaar makes a tantalizing proposition: competences in the field of negative state interference tend to centralise while for the responsibility for positive state interference to sink to the bottom. It is on the basis of this proposition that I discuss main constitutional challenge is the field of homeless policies, the danger of 'local dumping'.

A common feature in all countries is that the responsibility for social care for the homeless (shelter, housing, livelihood support) rests very much with the local authorities. We are now not referring to the regular national social assistance and housing schemes which are administered at a local level. What we are talking about are separate schemes and initiatives which specifically target the homeless and the destitute, organised and financed by the local authorities. Homeless persons rely heavily on these kinds of services. National authorities may not be interested in providing aid to those who have become destitute, but local authorities cannot ignore their presence and must offer support, if not for the reason of charity then for the reason of maintaining public order.

Certain groups can be very vulnerable in the local welfare state model. Migrants with weak immigration status are often not only excluded from formal national social housing and social assistance schemes, but also from the separate local initiatives aimed at protecting the homelessness. Access may be refused for legal reasons but there are other explanatory factors as well (habitual residence or local connection test, the duty to register, prejudice, mutual distrust, etc.). Also the Roma, who often live outside the formal public domain, may face such exclusions. Now, only civil society remains to offer a helping hand. It is a domain of the Salvation Army, churches, voluntary citizen's initiatives, charities and political parties.

In practice, at the local level civil society support and public welfare are much intertwined.[7] For example cities channel their support through civil society agencies or simply provide financial support to such agencies. Of course, there is nothing wrong with local welfare state support and civil society involvement. Homeless support can only be arranged at this level as the interventions must be adjusted to the needs and requirements of each individual and the local circumstances. Yet the local welfare state model which evolves outside a national financial and regulatory framework, has many drawbacks.

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[7] D. Pieters & P. Schoukens, *Explanatory report on the access to social protection for illegal labour migrants*, Strasbourg: Council of Europe 2004.

In the first place there is the risk that local authorities may be inclined to raise barriers to prevent outsiders from receiving support due to the fear of 'social tourism', now between local communities. The same fear may hinder the municipalities in further developing the quality and the scope of their services. The raising of barriers for outsiders has been reported as a new phenomenon in the Netherlands, in the form of a *regionaal bindingsvereiste* for d*aklozenopvang* under the Social Support Act (Chapter 16 Rieneke Roorda), as well as in the UK, where cities are allowed to apply a local connection test for housing support (Chapter 11 Sarah Wallace). Such requirements hit migrant homeless persons particularly hard. National subjects who are rejected, have the opportunity to go to another place with which they have a stronger bond, but for new groups of immigrants such places simply do not exist, unless they go back to their home countries. Sometimes barriers are put into place not in reaction to a real influx of destitute foreigners, but simple in fear thereof. Thus for example, the spectre of Roma coming from new EU member states haunts many local communities in Europe (Chapter 10 Delphine Poussin). Whether applying a local connection test as a requirement for homeless services is in line with international human rights standards is debated. FEANTSA has initiated a complaints procedure about this against the Netherlands at the European Committee of social rights (Complaint No 86/2012).

In the second place, local welfare structures are strongly fragmented, limited in scope and vulnerable to economic adversity. Hence they are not always capable of providing support at an adequate level on a structural basis, particularly not in these times like these in which countries must face the consequences of a major financial and economic crisis. Another weakness related to this is that local welfare support structures are subject to populist and xenophobic pressures. Thus, for example there are indications that in countries like Italy, France and Greece local projects for the Roma have grounded to a halt by lack of local political support.[8]

The policy challenge is to curb the trend of local dumping by making sure that preventing and combatting homelessness is defined as a national responsibility in line with the constitutional imperative. This implies that there should be national financial and regulatory framework to support the local authorities in their efforts.

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[8] EU Agency on Fundamental Human Rights (FRA), United Nations Development Programme (UNDP), *The situation of Roma in 11 EU Member States Survey results at a glance,* Luxembourg: Publications office of the European Union 2012.

3 Homelessness, public order and criminal law

3.1 Legal issues

Providing social welfare support is not the only way for states and local authorities to solve the problem of homelessness. Another policy is to respond with repressive measures, ranging from local bylaws which prohibit begging to national policies aimed at the criminalisation of illegal stay.

As was mentioned in the introduction: homelessness and repression are no strangers to each other. The nineteenth century poor laws made a clear cut distinction between the deserving poor and the undeserving. Those who were not incapacitated as a result of sickness, handicap or old age (the so called able bodied) were forced to participate in publicly organized employment. Work houses were set up in which men, women and children had to perform manual activities in miserable conditions for long hours a day. There was no easy escape from the work house. Dealing with poverty was considered to be part of the policing function of the state. Vagrancy was a criminal offence. In some countries vagabonds were literally rounded up and kept in confinement in forced labour camps.

With the advent of the welfare state measures were increasingly aimed at protection, supporting and integrating the homeless in the society. Poverty became a subject of social policies. Yet a repressive response to homelessness is always looming in the background. While vagrancy has been abolished as a criminal offence, it is still possible for towns to enact bylaws, prohibiting loitering in the public spaces, public drinking, begging etc.

A remarkable insight following from the research carried out by the students is the width and variety of the new public order and criminal responses to homeless. In Chapter 5 Michel Vols and Dewi Duran discuss the phenomenon of the exclusion order on homeless people after they have disturbed the public order or violated a local regulation. The exclusion order is a ban imposed on an individual prohibiting him or her from being in a specific area within the local authority or from being within a particular distance from some object within the local authority. As it turns out, the exclusion order is an administrative measure in both the Netherlands and Belgium, while in England and Wales it is seen as a civil measure. The authors conclude that decriminalisation of the exclusion order makes it possible for local government to tackle anti-social behaviour without this resulting directly in a criminal record for the offender. On the other hand the offenders have less legal protection. According to the autors this is acceptable if the order is imposed for a short duration and is aimed at restoring public order and preventing anti-social behaviour. In Chapter 6 Andrew Fletcher discusses the exposure of homeless people to the criminal justice system in New South

Wales. Fletcher argues that the government programmes which are relevant for the rehabilitation of offenders do not target the problem of homelessness *per se*, but instead other problems such as mental illness, drug dependency or alcoholism. This is consistent with the 'preventative' approach taken by most Australian governments to the problem of homelessness; i.e. that the most effective way to reduce rates of homelessness is to treat what are perceived to be its root causes, but according to Fletcher this is cold comfort to those who are already experiencing primary homelessness. In Chapter 7 Koen Bandsma discusses begging as a criminal offence. He observes that in the Netherlands, despite the decriminalization on a national level, many local authorities have introduced their own local regulations prohibiting begging. Bandsma examines why the municipality of Groningen added a prohibition of begging to its bye-laws and how this prohibition functions in practice. He concludes that the main argument was a perceived increased rate of nuisance due to begging in the city, despite claims by the Dutch government that begging hardly occurs any more. The prohibition, probably in combination with other factors such as improved assistance for beggars, appears to have reduced the levels of nuisance caused by begging. Finally, in Chapter 8 Miko van der Veen discusses the question of whether homelessness is relevant factor in criminal law proceedings, or to be more accurate: 'is the fact that the sentence causes some individuals to become homeless and others not a relevant factor to be taken into account by the courts and are there any reasons to attach consequences to the relationship between repeated offence, criminal behaviour and homelessness?'. The question is not without relevance as it appears that in the Netherlands ten percent of prisoners go to prison homeless while 25% come out homeless. Ignoring the appeals by Dickens, Van der Veen builds up his own case why the criminal judge should ignore homelessness as a relevant factor.

3.2 Policy challenges: the rise of the repressive welfare state

Our own research indicates that repressive responses are making a comeback, but there are other sources that support this observation[9], most notoriously from Hungary which in October 2013 introduced a new act enabling local authorities to make it a criminal offence for the homeless to live in public spaces, despite earlier criticism from the European and international human rights institutions and the Hungarian Constitutional Court.[10] For our subject of homeless migrants, there is another trend to be taken into account as well,

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[9] G. Fooks & C. Pantazis, 'The criminalization of homelessness, begging and street living', in: P. Kennett & A. Marsh (eds.), *Homelessness, exploring the new terrain*, Bristol: Policy Press 1999.

[10] The Court rejected an earlier Hungarian law criminalising homelessness on 12 November 2012, case I/01477/2012.

i.e. the criminalisation of illegal stay of non-nationals (for the situation in the Netherlands cf. Dennis Ros Chapter 13). The trend has been commented upon elsewhere, amongst others in 2009 in a report prepared by Elspeth Guild for the Commission for Human Rights of the Council of Europe.[11] The report shows that an increasing number of countries are making illegal entry an offence under criminal law, punishable by fines, imprisonment and expulsion. According to Guild the trend to criminalize irregular immigrants bears a number of common characteristics. First there is the pervasive way in which the measures (a) separate foreigners from citizens through an elision of administrative and criminal law language and (b) subject the foreigner to measures which cannot be applied to citizens, such as detention without charge, trial or conviction. Secondly, there is the criminalisation of persons, whether citizens or foreigners who engage with foreigners. The message which is sent is that contact with foreigners can be risky as it may result in criminal charges. This is particularly true for transport companies (which have difficulty avoiding carrying foreigners) and employers (who may be better able to avoid employing foreigners at all). Other people, going about their daily life, also become targets of this criminalisation such as landlords, doctors, friends etc. Contact with foreigners increasingly becomes associated with criminal law. The result may, according to Guild, include rising levels of discrimination against persons suspected of being foreigners (often on the basis of race, ethnic origin or religion), xenophobia and/or hate crime.

The policy challenge is not so much that states must refrain from treating homelessness as public order problem, but that they cannot resort to the criminal law system or public order measures as an alternative for social protection. The constitutional imperative to prevent and protect the homeless must be realised by measures aimed at the welfare of individuals concerned; the prison house is not an alternative to the welfare system.

4 Homelessness and immigration

4.1 Legal issues

Homelessness and immigration are very much intertwined. According to data gathered by Feantsa in 2012 there is an increasing proportion of homeless persons who are immigrants. They do not only cover (refused) asylum seekers, stranded third country workers, but also and increasingly EU mobile citizens. What matters here to us is that legal exclusions are one of the causes of this. The situation is complex. Depending on their specific

[11] E. Guild, *Criminalisation of Migration in Europa: Human Rights implications*, Issue Paper Commissioner for Human Rights, Council of Europe Publishing 2010.

status migrants might be formally excluded from access to the labour market in the host country and/or to the social services which are designed to protect the vulnerable and the weak: social insurance, assistance, social housing and shelter, medical aid, etc. When a migrant is legally speaking not entitled to access work or this social safety net, he or she may be forced to live on the fringes of society and on the streets.

The deficit in legal protection for migrants does not only exist in national law, but also in international and European law. In fact, some of the legal causes of destitution and homelessness among EU mobile citizens can be traced back directly to weaknesses in European protective regulatory standards.[12]

For EU citizens the greatest impact stems from the provisions on the freedom of movement of persons. They provide not only access to the labour markets, but they also protect against the loss of social security rights and discrimination on grounds of nationality in the field of all sorts of social and fiscal advantages. However the relevant EU provisions are not very generous for the poor, defined as persons with 'insufficient resources of their own'. They have no temporary residence rights and their right to social assistance benefits is somewhat clouded. Indeed, when it comes to this category of EU-citizens it appears that there are still many uncertainties and unresolved questions. For example we do not know whether the persons who are legally entitled to non-contributory cash benefits may lose their preferred EU residence status on the grounds that they do not have sufficient resources of their own, although the Brey case of September 2013 (Case-140/12) has offered at least some clarity in this respect. We do not really know what exactly is meant by a 'genuine link' with the labour market with the ECJ requires for job seekers who want to claim social assistance benefits is their host country.[13] Neither is it fully clear whether local authorities can apply a 'local connection test' when EU mobile citizens apply for shelter and emergency relief, although the odds are against it. Such a test would probably not satisfy the non-discrimination principle on grounds of nationality, but this has not yet been confirmed by the ECJ.

By reason of the many grey areas which exist in between ECJ case law on European citizenship and the hard texts of secondary EU law, states have

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[12] For an overview of the state of the law, cf. H. Verschueren, 'Union law and the fight against poverty: which legal instruments?', in: B. Cantillon, H. Verschueren & P. Ploscar (eds.), *Social inclusion and social protection in the EU: interactions between law and policy,* Antwerpen: Intersentia 2012, p. 205-231 and the various contributions included in: E. Guild, S. Carrera & K. Eisele, *Social benefits and migration: a contested relationship and policy challenge in the EU*, Chapter 8, CEPS paperbacks 2013.

[13] ECJ Case C-138/02 (Collins v. Secretary of State for Work and Pensions) and C-22/08 (Vatsouras and Koupatantze, v. Arbeidsgemeinschaft (ARGE) Nürnberg).

considerable leeway to interpret EU law according to their own national interests. The contribution of Valentin Günther in Chapter 9 dealing with the right to social assistance and housing in Germany is a showpiece of the legal difficulties that may arise in this respect. Also the contribution on the right to housing in the UK by Sarah Wallace (Chapter 11) illustrates this issue.

For the destitute and the homeless, the bottom line is that they are no longer protected by EU law. As minimum subsistence benefits schemes of the member states often employ conditions with regard to legal residence, a loss of EU residence status may imply a subsequent loss of benefit rights. Despite the many guarantees EU law offers in case forced return,[14] the result is nonetheless that EU citizens may eventually be expelled. The lack of resources and the threat of expulsion may force people to move underground, to resort to marginal activities in the shadows of the official society, to beg and to sleep rough. Some will end up in dire straits, others may pick up their lives and move elsewhere to look for better fortune.

If the above situation applies for destitute EU citizens, the plight of third country homeless cannot be very much better. It is not, although this does not mean to say EU is totally irrelevant or this group. There is a growing body of directives which have some impact on the prevention of homelessness and destitution, based on Articles 77 to 81 TFEU. A characteristic of most of these directives is that they mostly protect well defined, limited groups of persons: such as victims of human trafficking,[15] asylum seekers (now defined as persons seeking international protection[16]), migrants who are engaged in voluntary or involuntary return proceedings to their home countries.[17] Also permanently residing third country nationals enjoy some protection.[18]

4.2 Policy challenges: from exclusion to integration

Homeless migrants are outsiders. They live in a parallel world of undeclared labour, alternative social support services, sheltered accommodation, make shift camps spatially separated from the rest of the society or even in caves. In this way they form sub strata of society, situated at the very bottom of the social order. The exclusion from the formal public domain is expressed in a weak legal status of migrants with insufficient resources have a weak migration status and vice versa. The weak legal status negatively

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14 Article 14(3) and Article 33(3) Directive 2004/38/EC.
15 Human Trafficking directive 2011/36/EC.
16 Directive 2013/33/EU laying down standards for the reception of applicants seeking international protection.
17 Return directive 2008/115/EC.
18 Long-term residence directive 2003/109/EC.

effects access to the regular social security system and to social housing. It threatens the migrant with forced removal from the country and hinders the acceptance of a policy geared towards emancipation and integration into the society. The result is that homeless migrants live a life in limbo. They neither leave the country nor will they be fully accepted as regular citizens. Even when the immigration status is as such not an obstacle for claiming support, access to benefits and local support may be made impossible by national residence or local residence requirements.

The limbo status of homeless migrants can exist by virtue of the fact that they are under a duty to leave the country. But mostly they do not leave, neither are they expelled. There is just no evidence that return policies for homeless migrants are effective. When countries resort to forced expulsion measures, the measures prove to be ineffective or to run against basic European human rights standards (e.g. the France Roma policy in the second half of the last decade). When such measures are not taken and life is made simply very hard for homeless migrants, this does not seem to have any effect on the actual numbers of migrants returning either. If there is any result to be expected from return programmes, apparently such programmes must be framed in terms of voluntary social rehabilitation, such as the ininitiatives of the Polish charity Barka to 'reconnect' stranded homeless migrants with their countries of origin.[19] But even these initiatives are not free of criticism. Return policies remain a sensitive terrain.

Keeping migrants in limbo may not be seen as a form of collateral damage resulting from immigration policies. Such an approach is not constructive and contrary to the human dignity. The only alternative is for policies and services for homeless migrants to aim at the long term integration in the society. It seems contradictory to speak of integration when dealing with persons with a weak or no immigration status but there are little other alternatives. Perhaps curbing exclusionary policy to integration should first be done in the own back yard of the EU. While it is theoretically feasible to return EU nationals to their home countries when they lose their EU residence status, EU law imposes so many restrictions on this, that it can be doubted whether structural policy solutions depend upon forced return. On grounds of article 14(3) of Directive 2004/38/EC an expulsion order shall not be the automatic consequence of the recourse of a European Union citizen or his or her family member to the social assistance system of the host Member State. Member states must examine whether the loss of income is the result of merely temporary difficulties. They should also take into account the duration of the residence and the amount of state benefits a person is receiving. Furthermore the ECJ requires that the proportionality

[19] <www.barkauk.org>.

principle should be adhered to: national measures must not go beyond what is necessary to achieve the objective of protecting the public finances of the host state. As a result of these strict conditions, in our view it is no longer realistic for Member States to aspire to any forced return of EU nationals and concentrate fully on the integrating of the homeless. And yes, when this is in the best interest of the individual concerned this might also, but not necessarily imply a voluntary reconnection with the home country.

The policy challenge is to accept that policies and services for homeless migrants should aim at the long term integration in the society instead of exclusion, starting with EU nationals, also when they have insufficient resources and rely on public funds of the host country

5 Human rights responses and access to justice

5.1 Legal issues

Perhaps, in a dialectical manner, it is in view of the dire situation of the homeless and their lack of legal status that human rights play such an important role for this group. If the legislator is focussing strongly on the exclusion of social rights and repression, thereby ignoring basic human rights, the more inclined courts and human rights agencies will be inclined to address needs of the individual and to formulate legal boundaries.

Indeed, human rights agencies such as the EU Fundamental Rights Agency[20] and the UN Human Rights Council[21] have recently paid a great deal of attention to the theme of destitution and homelessness. Also, there is much case law of both the ESRC and the ECtHR.[22] Human rights may also leave traces in the interpretation of EU law which may have an impact on homelessness, even as far as the Mortgage Credit Directives are concerned (Chapter 15 Jochem de Kok).

But most of all, the role of domestic court cases must not be underestimated. A perfect illustration of the role of the courts is included in this book in

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[20] Cf. *inter alia* Fundamental rights of migrants in an irregular situation in the European Union (November 2011); Migrants in an irregular situation: access to healthcare in 10 European Union Member States (October 2011); Migrants in an irregular situation employed in domestic work (July 2011); Housing policies promoting integration and community cohesion at local level (June 2009).

[21] Cf. Guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, 18 July 2012.

[22] Cf. the contributions included in *Redefining and Combating Poverty. Human Rights, Democracy and Common Goods in Today's Europe*, Strasbourg: Council of Europe Publishing 2012.

Chapter 12 in which Sybren Koopmans gives a lively and accurate account of the situation in the Netherlands where, under pressure of the Social Rights Committee[23] and subsequent domestic case law, government had to agree to set up special family locations for irregular migrants, in order to avoid vulnerable young children being sent out onto the streets to fight for themselves. The protection by the courts cannot be taken for granted. Homeless persons are not likely to fend for themselves to ask for legal redress. What is required is a system of legal aid which allows professional organisations or charities to make legal representations on behalf of individuals concerned. In Chapter 16 Anna Willis gives a lively account of how this system operates in the UK, making use of Citizens Advice Bureaus, a professional institution which also benefits from volunteers.

5.2 Policy challenges: homeless services should reflect basic human rights standards

Human rights case law tends to flow towards some form of recognition of minimum social care responsibility, even in some cases for irregular immigrants. This minimum care responsibility does not express itself in some general rights to social and medical assistance, but rather in the recognition of a duty to provide medical support, shelter or aid in individual situations of exceptional vulnerability and need, for example when young children are involved, in cases of medical emergency or in cases where persons are left stranded and exposed. States are responsible for ensuring that there is a system of services for the homeless in operation that guarantees these basic requirements. This means that local authorities must open their homeless facilities to all stranded migrants, irrespective of status or nationality (instead of raising legal/administrative obstacles). Also states should work at the improvement of the infrastructure for protecting the homeless in general. Such infrastructure should at least entail access to food, clothing, shelter, basic medical care and education for children at a level which satisfies the generally accepted European standard. In case of doubt about what this standard is: Directive 2013/33/EU on the reception of applicants of international protection provides a perfect point of reference.

The policy challenge is to make sure that services of the homeless are in line with basic human rights standards and that these services are universally accessible, irrespective of nationality or status.

[23] ECSR 20 October 2009, complaint No. 47/2008 (Defence for Children v. the Netherlands).

6 Proposals for ameliorating the legal position of the homeless

In this last section I will turn my eye to the future and look into possible policy options for improving the legal position of the homeless, which address the four policy challenges formulated in the preceding four Sections. Two possible options will be briefly touched upon. The first deals with the position of EU-citizens. Is it feasible that the remaining restrictions applying in the field of freedom of movement and access to social rights could be lifted in order to give full protection to all mobile citizens, including those with insufficient resources of their own? As fear for social tourism and abuse of welfare rights is often adduced as the main obstacle for making this last step, we will focus in particular on various methods of sharing the costs of providing housing and social assistance between the member states. Perhaps such burden sharing may take away some of the fears the exists in many member states. The second scenario explores the possibility of introducing common standards for the protection of the homeless in an EU instrument. In particular we are interested in standards that reflect the minimum human rights responsibility member state have towards the protection of vulnerable persons who are in a situation of extreme need who reside in their territories, regardless of nationality and immigration status.

6.1 Towards unlimited access to the social safety net for EU-mobile citizens

Homeless and destitute EU citizens would gain very much from a decision to lift the final restrictions in the area of the freedom of movement for persons without insufficient resources. Suppose secondary EU law would place this group on equal footing with workers and restricting applying to the right to social assistance were scrapped? Residence rights would become inviolable and access to the social safety net fully secured. The reason why member states feel they cannot take this last step towards unconditional freedom of movement for all EU citizens, including non-active persons with insufficient resources, is related to the protection of public funds and the fear of an influx of claims from mobile EU citizens. The present restrictive conditions aim to forestall a migration of EU mobile citizens without sufficient means who are seeking a host country offering favourable social assistance schemes.

This observation brings us to the heart of the debate about 'social benefit tourism'. While so far there is no evidence that the EU freedom of movement results in any disproportionate burden on both the welfare system and the labour market,[24] there will always be a fear that this may change in future,

[24] Cf. *A fact finding analysis of the Member states' social security systems of the entitlements of non-active EU migrants to special non contributory cash benefits and health care granted on the basis of residence*, 14 October 2013 (revised 16 December 2013), European

particularly when conditions are further relaxed. And relaxing the conditions is not what all governments aim at.[25]

Perhaps the introduction of a system of sharing the cost of social assistance and housing benefits to EU mobile citizens between the member states can pull some of the member states over the line in accepting a further liberalisation of conditions for the freedom of movement of persons with insufficient resources. There are contemporary precedents for cost sharing mechanisms. For example, social security Regulation 883/2004 applies the system for various branches of benefit, most notably health care (Article 34) and unemployment benefits (Article 64). Social assistance is excluded from the material scope of application of this Regulation and is therefore not included in such co-ordinating mechanisms.

The most straight forward way of cost sharing would be that it is not the EU country of residence that pays the cost social assistance and housing benefits but the EU country of origin, in other words the member state of which the EU mobile citizen is a national. In principle the host state can charge the costs of the benefits to the country of origin. This is a solution that is most closely in line with the opinion that each country is primarily responsible for the financial wellbeing of its nationals. A more developed costs sharing system would be to charge the subsistence costs not to the member state of origin but to the European Union as a whole. The consequence of this is that the costs that may arise in connection with a possible change in the migration pattern of needy EU citizens are not borne unilaterally by the country of origin but are distributed evenly amongst all the member states. This second option of a common funding of the costs of social assistance and housing benefits would be more an expression of mutual solidarity between the member states.

6.2 Towards common EU standards for the protection of vulnerable persons in extreme need

A proposal for common EU standards for the protection of the homeless brings us close to the debate of the EU harmonisation of minimum income schemes. As early as 1981 the Commission issued a communication which addressed the problem of poverty in Europe and the need for common minimum income standards. In an attempt to address this problem, in

Commission, Directorate-General for Employment, Social Affairs and Inclusion. See also the analysis included in Guild, Carrera & Eisele 2013.

[25] Cf. Joint letter of the ministers of the interior of Germany and Austria, the UK home secretary and the Dutch immigration minister sent to the Irish Presidency in May 2013.

2010, the European Anti-Poverty Network launched a working document containing an elaborate and detailed proposal for a minimum income framework directive.[26] The same year a proposal for a resolution for such a directive was tabled in the European Parliament, but failed to get a majority. The Commission itself has not taken any further steps in this direction either, apparently because it is of the opinion that a legal basis in the TFEU is not available.

Below, I shall steer away from the minimum income debate and concentrate solely on the idea of introducing common standards for the protection of vulnerable persons in extreme need. The background, purpose and rationale of introducing such standards are different to proposals for a European minimum income. While the latter are aimed at the development of an adequate nationwide minimum benefit level which adheres to European standards, the former address the sub strata of the social system which includes more primary forms of support, shelter and aid for the destitute and the homeless. It stipulates the final responsibility of each member state for making sure that help is actually provided when this is needed, most likely at local level. Protective standards for vulnerable people in extreme need are not about an objective right to a certain level of social assistance. Neither are they rooted in anti-poverty policies, at least not exclusively. The primary goal is to adhere to the basic human rights responsibility ensuing from both UN and Council of Europe human rights treaties and the EU Charter of fundamental rights. It follows from these human rights that states have an obligation to provide medical support, shelter or aid in situations of extreme need or vulnerability, for example when young children are left unprotected or in cases of medical emergency. This human rights obligation is highly individualised but member states could nonetheless -at least- accept a duty based upon the discretionary powers of the local authorities. With this duty corresponds a reflexive right for the individuals concerned. As the human rights responsibility extends to all human beings regardless of migration status or nationality, they apply vis-à-vis all vulnerable people, be it local or stranger, regular or irregular.

While the primary rationale of an EU protection instrument for vulnerable persons in extreme need is to create an objective standard for the positive obligations that member states have under human rights obligations, such an instrument further helps to curb some of the policy challenges addressed in the previous Sections. It stops the process of 'local dumping' by reaffirming a final responsibility of the member states for care for the homeless. It also prevents member states from slipping further into a merely repressive response to the problem of homelessness. The instrument could include a provision stipulating that criminal detention and surveillance does

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[26] A. van Lancker, *Working Document on a Framework Directive on Minimum Income*, Brussels: EAPN 2010.

not serve as a form of protection within the meaning of this instrument.

The instrument should apply to all persons who are present in the member states, regardless of the degree of integration, nationality or immigration status. This very wide personal scope follows from the human rights background of the instrument. The other side of the coin of the wide personal scope of application is that groups deserving protection should indeed be narrowed to those who 'vulnerable and in extreme need'. It follows from human rights case law that belonging to a certain collective group: young children, the handicapped, Roma, etc. is seen as an important indication for one's vulnerability.[27] This could be reaffirmed in the instrument, with reference to the various protected groups concerned. In particular it is suggested that the homeless are referred to as one of the categories of vulnerable people. (Group) vulnerability is not enough to invoke the right to protection. There should also be a situation of 'extreme need'. In order to cut short a lengthy legal analyses dealing with this concept, we propose that such a situation occurs when denying protection seriously aggravates the predicament of an individual and exposes him to an inhuman, degrading or life threatening situation. For example, by not providing proper shelter to a person who suffers ill health and anxiety, the situation of that person may deteriorate even to the extent that it can be said to be inhuman, degrading or life threatening. Denying help is then tantamount to an active interference and harmful action.

As to the level of protection, a suitable point of reference is Directive 2013/33/EU laying down standards for the reception of applicants for international protection. Article 17(2) of Directive provides an overall credible description of the protective standard involved: 'Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health' An attractive aspect for relying on Directive 2013/33/EU by analogy is that the directive actually stipulates further rules as to what is to be understood by this protective standard (Article 17- Article 19) as well as additional guarantees such as the right of the families to stay together (Article 12) and access to housing for minor children (Article 14).

Apart from the above type of standards dealing with the quality of protection and with ancillary rights (family life, access to schools etc.), the instrument should include an overall obligation for the member states to set up a regulatory and financial framework which enables the local authorities or third parties to provide the required level of protection. This infers that national government cannot define the care for the homeless exclusively as a regional, local or civil society affair. Also it could be stipulated that national governments should provide for additional funding in case a local

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[27] L. Peroni & A. Timmer, 'Vulnerable groups: the promise of an emerging concept of European human rights', *ICON* 2013 (4), p. 1056-1085.

community is confronted with an influx of homeless and destitute persons. Simultaneously, the member states should make sure that the protection at local level is actually realised in line with the obligations of the instrument. This infers the setting up of a strict supervisory and reporting mechanism to the national government.

In view of the rise of repressive responses to homelessness in some countries it is furthermore important that it is stipulated that member states cannot adhere to the required standards through detention and criminal surveillance measures

Another important standard concerns the domicile of protection. Member states are responsible for protecting all vulnerable persons in extreme need who are present in the country. This implies that there is no room for a national habitual residence test. The instrument should further stipulate that when local authorities apply a local connection test, the member states must guarantee that such a test does not stop local authorities from providing temporary relief until the person is handed over to the authorities where the individual is considered to be rooted. For those without any local connection at all, protection must nevertheless be granted by the local community where the individual is present.

Moreover, the instrument could cover the issue of access to the justice system. This could be realised by a provision which obliges member states to make sure that individuals who are refused aid, will receive a decision in writing which is subject to review and appeal.

Lastly, it would be relevant to include a clause on the possible return of an individual to his country of origin, a so called reconnection clause. Return must be voluntary and measures should be based upon a consensus amongst all the stakeholders, including the sending and receiving member states and should serve the best interest of the mobile citizen or migrant.

Part II
Homelessness as a constitutional challenge

Chapter 2
Homelessness, constitution and governance

Albertjan Tollenaar

1 Introduction

Homelessness is almost by definition a local problem, occurring in local communities, neighbourhoods or cities. It is therefore the local government that is the first to respond to the problems that accompany homelessness, including for example safety issues, maintaining public order and health care for homeless people. To solve these problems, especially when it comes to providing care, local governments use the civil society organisations such as churches, the Salvation Army and other NGOs, which are also locally based.

This local response takes place within a legal framework that is often organised at another (higher) level. Indeed, the rights and entitlements of people living on the streets are generally regulated in national legislation with due observance of the obligations developed within the human rights framework.[1]

This regulatory framework it not exclusively confined to rights and entitlements.. Other aspects related to homelessness are also regulated in national legislation such as the (ir)regularity of immigrant, or the legal instruments that local authorities can use to combat the nuisance caused by homeless people.

This gives rise to an interesting problem. The rules and regulations that affect the homeless are formulated at a governmental level other than that at which the problems related to homelessness tend to be resolved in practice. This in turn gives rise to the risk that legislation does not truly reflect the reality faced by local governments. For example, legislation tends to be austere,[2] although in practice local governments might experience that this does not reduce homelessness and perhaps even has the opposite effect. The less access those in need have to public support (shelter, income), the higher the chance that they will end up on the streets. This is an example of policy choices at national level actually creating social problems at local level.

This problem leads us to two central questions. First of all: what is the constitutional framework of the regulation regarding the homeless? To answer

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1 See the contribution of Perrault in this volume.

2 Loïc Wacquant, *Punishing the Poor, the Neoliberal Government of Insecurity*, Duke University Press 2009.

this question I will first give a brief overview of the constitutional framework as such (paragraph 2). What are the ingredients of the constitutional framework, and how does this vary from state to state? Section 3 discusses the key elements of the constitutional framework regarding the homeless.

The main conclusion is that the legal infrastructure regarding the homeless is based on a constitutional framework where central and local governments have to work together. Homelessness then becomes a problem of 'governance'. That brings us to the second research question: how does this constitutional framework actually function? This question will be addressed in section 4 based on three cases. Section 5 ends with some concluding remarks.

2 Ingredients for the constitutional framework

The constitutional framework affects many aspects of governmental institutions, from human rights to the horizontal and vertical separation of powers.[3] The intergovernmental relationships between central and local government units are of particular relevance for the homelessness issue. This relationship focuses on one key question: who has what competence? The answer to this question includes at least four elements.

The first of these elements is the balance of power in the relationship between central and local governmental units. Is this a hierarchal relationship in which the national governmental body can instruct, correct or at least restrict the competences of the local governmental bodies, or is it a horizontal relationship in which all the governmental bodies are more or less 'equal'? In a horizontal relationship the competences of all governmental bodies are strictly regulated in the constitution. In a hierarchal relationship the competences of the lower governmental bodies are mainly based on the decisions made by the central government. It is the national legislator that calls upon the lower governmental bodies to administer or to implement the national legislation (co-administration). Only if the central government does not regulate a matter does the lower governmental body have the autonomy to promulgate rules itself. The first element of the relationship is thus how competences are regulated or restricted, whether in a constitution or in legislation.

The second element regards supervision. In co-administration in particular the constitutional framework often has elements of supervision. This supervision is intended to direct how the lower governmental body uses its competences. Supervision is mainly about acquiring information about how the lower governmental bodies implement legislation. Sometimes this information shows 'mismanagement'. In these circumstances supervision

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[3] M. Thushnet, 'Comparative constitutional law', in: M. Reimann & R. Zimmermann (eds.), *The Oxford handbook of comparative law*, Oxford Univerity Press 2008, p. 1228.

ends up with some kind of intervention. This intervention can range from 'taking over competences' to 'giving an instruction' or 'declaring a decision void'.

It goes without saying that in intergovernmental relationships - as in any relationship - conflicts will occur. Conflicts about the scope of the competence or about the way competences are used. The third element in the constitutional framework refers to how disputes are settled between governmental bodies. In many states a special court (constitutional court) is charged with settling these disputes and in other countries it is up to the 'ordinary' courts to deal with these issues.

Finally the last element of the constitutional framework regards the budget. In all states there is some kind of re-allocation of means from the centre towards the lower governmental bodies. But the amount of this budget and more especially the percentage compared to the means that these lower governmental bodies can levy themselves, varies. There is also a wide variation in the strings attached to the budget provided by central government.

The constitutional framework of a particular state varies in relation to these aspects.[4] Exploring the constitutional framework of a particular state shows that no two states are similar. Despite the differences one could divide states into three different categories: unitary states, federal states and confederations. It is important to observe that these qualifications are only devices to help us understand a specific constitutional system. After all, constructional systems vary over time and shift from a federal towards a more unitary state (e.g. New Zealand in 1879) or from a unitary towards a more federal state (e.g. the UK where Scotland and Wales have their own legislatures).[5]

In unitary governmental systems the main power is centralised, based on national legislation. Subnational entities, such as local governments, have limited legislative powers and are restricted by the national legislation. In unitary states the fiscal regime aims to reallocate means from the richer areas to the poorer. This is often done implicitly through national taxation and the budgetary relationship between the national and subnational entities. Unitary states often face the problems of being distanced from their regions and a lack of national identity.

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4 H.A. Mollel & A. Tollenaar, 'Decentralization in Tanzania: Design and application in planning decisions', *International Journal of Public Administration* 2013 (36), p. 344–353; V. Venugopal & S. Yilmaz, Decentralization in Tanzania: An assessment of local government discretion and accountability, *Public Administration and Development* 2010 (30), p. 215–231.

5 Jay M. Shafritz, E.W. Russel & Ch.P. Borick, *Introducing public administration*, 8th edition, Pearson 2012, p. 133.

Federal government systems have a greater scope for diversity in policy.[6] The subnational governments are in principle free to draft rules and legislation on any topic. The fiscal strings are weaker, and the power from the centre is often challenged since these powers are based on the constitution that needs to be interpreted over and over again. Examples of federal states are the United States of America and Germany. The heated discussion in Germany on the intention of the Government of Bayern to introduce some kind of toll on the highways and the way the central government responded to this shows how federal states have to repeatedly explore the boundaries of their jurisdiction.

In confederal states central power is almost absent. Often the central government does not have the power to levy taxes. It mainly acts as a means for the subnational entities to regulate certain matters at a higher level. These matters might be the army or an economic community. Confederal states are actually states in denial and often face the question 'how should we proceed?' The European Union is an example of a confederal state. In the present campaigns for the European Parliament elections this existential question is raised by both the parties in favour and against a European community.

3 Constitutional framework for the homeless

3.1 Positive and negative state action

How is the constitutional framework structured in relation to the problems faced by the homeless? In answering this question it is first of all important to realize that homelessness is a multifaceted legal problem. Many aspects of the law either contribute to homelessness or might aim to solve this problem.[7] The law regulates who has access to public protection for example in the form of shelter, health care or social security. The law regulates the degree of protection and the conditions subject to which this protection is provided. The law also regulates the instruments that governments can use to combat the consequences of homelessness, such as nuisance or disturbance of public order (begging).

In this amalgam of instruments it is necessary to make a rough distinction between legal instruments that have a *positive* effect and those with a *negative* effect. Positive legal instruments have in common that they increase the freedom or property of the citizens. Negative legal instruments restrict this freedom or property.

This distinction between positive and negative state action is relevant for two reasons. First, instruments with a negative effect will need a sound

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6 Shafritz, Russel & Borick 2012, p. 133.

7 The following chapters in this volume provide an overview of all these aspects.

legal basis.[8] From a continental point of view this is the application of the 'legality principle' (Legalitätsprinzip). But also in common law countries the administrative governmental powers are restricted by law and legislation; a requirement that is far more restricting when it comes to *negative* state action.[9] Positive instruments on the contrary, do not have this characteristic. Public authorities do not have to have a sound legal basis in legislation to increase an individual's freedom or property.

The second reason why this distinction is relevant regards the constitutional design of these instruments. This will be addressed in this paragraph in relation to the instruments available for addressing homelessness issues.

3.2 Negative state action

The most obvious *negative* state action is found in the many restrictions that apply to everyone but that harm the homeless most. Consider the prohibition on begging, exclusion orders that ban an individual from entering a specific neighbourhood or mall or any other obligation that mainly affects homeless people.[10] The regulation of immigration is a special 'branch' of negative state action since it principally centres upon preventing foreign nationals from gaining access to the country and its social services and is often combined with sanctions.

The fact that negative state action requires a sound legal basis makes the constitutional framework rather clear. There has to be an act or statutory law that explicitly states the prohibition and allows an administration or a prosecutor to enforce this prohibition. Where this act or statutory law can be found depends on the governmental structure. But nevertheless there is one main characteristic that all governmental bodies seem to adhere to: a tendency for negative state action to be increasingly centralised at the higher governmental bodies in the governmental system.[11] One could take the European Union as an example. After the development towards one single market with similar 'values', European co-operation is now continuing towards developing a common European criminal law, with a European public prosecutor.[12] Equal treatment and effectiveness are the driving arguments for this centralisation of austerity.[13]

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8 A. Tollenaar & J. de Ridder, 'Administrative Justice from a Continental European Perspective', in: M. Adler (ed.), *Administrative justice in context*, Oxford: Hart, 2010, p. 309.

9 See John S. Bell, 'Comparative administrative law', in: M. Reimann & R. Zimmermann (eds.), *The Oxford handbook of comparative law*, Oxford Univerity Press, 2008, p. 1272.

10 See the contributions of Vols & Duran and Bandsma in this volume.

11 See: Danny MacKinnon, 'Devolution, state restructuring and policy divergence in the UK', *The Geographical Journal* 2013 <DOI: 10.1111/geoj.12057> and for a Dutch case: G.J. Vonk, 'Repressieve verzorgingsstaat', *NJB* 2014 (2), p. 95-102.

12 Based on 'The Stockholm Programme - An open and secure Europe serving and protecting citizens', C 115 of 4 May 2010

13 E. Preteceille, 'Decentralisation in France: new citizenship or restructuring

3.3 Positive state action

Positive state action relating to the problem of homelessness regards the regulation of protection such as shelter or any other social protection that might help the homeless to improve their situation. The instruments regulate how this protection is accessed, the conditions that apply and the form of protection to be granted. Since a sound legal basis is not required the local governments are able to formulate rules or provide protection even if this is in the form of a subsidy to a non-governmental organisation that provides the support in practice. Local governments have large discretion in this and formulate their own rules on how to use this discretion.[14]

This does not mean that higher governmental bodies are irrelevant. On the contrary, it is the central state and therefore the national legislator that is responsible for the implementation of social rights. This is even the case in federal or to a certain extent in confederal states.[15] In unitary states the solution is easy: the national legislator will formulate legislation laying down a fundamental level of support that all citizens can apply for.

But central government will also have some involvement in federal or confederal states. If not by judicial means, then by budgetary means. The centrally formulated level of protection inevitably results in a re-allocation of means, from the 'richer' areas to the 'poorer'. This opens the door to a budgetary relationship from the centre towards the local governments.[16] The ambition of this re-allocation does vary. In unitary states this re-allocation is already part of the constitutional framework, and is therefore mainly non-debatable, whereas in confederal states such a re-allocation will always be subject to political discussion and negotiation.[17] To complete the constitutional framework some kind of supervision is attached to make sure that the budget is spent correctly and the legal instruments are implemented according to the higher rules.

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hegemony?', *European Journal of Political Research* 1988(16), p. 409–424. See Paul D. Hutchcroft, 'Centralisation and decentralisation in administration and politics: assessing territorial dimensions of authority and power', *Governance* 2001 (1), p. 23-53 for an overview of the argumentations on centralisation and decentralisation.

14 Tollenaar & De Ridder 2010, p. 301-320.

15 That this does not work out always is shown in the contribution of Perreault in this volume.

16 See the cases discussed in J.A. Rodden, G.S. Eskeland & I Litvack (eds.), *Fiscal Decentralization and the Challenge of Hard Budget Constraints*, Cambridge, MA: MIT press 2003.

17 This is illustrated by the continuous debates in the European Union on the measures needed to resolve the credit crisis or Euro-crisis. This debate is about the extent of European solidarity or - as some politicians put it - on how much money is transferred from the North to the South.

4 Governance of homeless issues

4.1 Governance of the constitutional framework in general

How does this constitutional framework affect the way local governments respond to the problems related to homelessness? The conclusion of the previous section is that the local governments are confronted with the actual problems and might respond either with positive (enlarging) instruments or negative (restricting) instruments. In both situations the rules and regulations are mainly formulated elsewhere, at a different (higher) level. In other words the actor that formulates the rules is not the actor that actually has to implement them. This is a problem of *governance*.[18] Governance is a 'catch all' term that boils down to one central question: how can one influence the other to do things he or she did not think of before.[19] From the perspective of the lower governmental body the governance issue deals with gathering support for the problems they envisage. This support ranges from legal instruments that 'fit' the situation, to sufficient budget.

From the perspective of the central governmental bodies it is a question of implementation. How can they ensure that local bodies adhere to the norms written down in the central acts?[20] To achieve this goal the central government has various instruments available, varying from supervisory competences (setting aside decisions, issuing directions). These judicial means will often cause conflicts in the constitutional relationship, and are therefore very costly. In general it can be said that if the supervisor intervenes too often the supervisee will stop co-operating at all, making this intervention even less effective.[21] Other instruments will therefore be more attractive as a means of to 'governing' this problem. Regulating through budget is a frequently used mechanism.[22] With 'grant programmes' central governmental bodies might be able to 'buy' alignment. One could debate the effectiveness of these instruments. If there are too many grant programmes it is likely that some of them will interfere. And furthermore, grant programmes create a new oversight arrangement, with the problem of effectiveness referred to above.

The last category of instruments for 'governing' the relationship between

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[18] Shafritz, Russel & Borick 2012, p. 141 call it 'intergovernmental management'. Paul D. Hutchcroft 2001 refers to it as a matter of governance.

[19] See for a review of this literature: Johannes M. Bauer & Jonathan A. Obar, 'Reconciling Political and Economic Goals in the Net Neutrality Debate, *The Information Society: An International Journal* 2014 (1), p. 1-19.

[20] Michael Hill & Peter Hupe, *Implementing public policy*, London: Sage 2002, p. 41.

[21] See: J. de Ridder, *Een goede raad voor toezicht,* The Hague: Boom juridische uitgevers 2004, p. 42; and H.A. Brasz, *Toezicht op gemeentebesturen*, Alphen aan den Rijn 1964. The 'educated guess' is that if the supervsior intervenes in more than between 5 - 15% supervision will lose its effectiveness.

[22] Shafritz, Russel & Borick 2012, p. 147.

the governmental bodies is that of instruction, convincement and nudging. These are three instruments in the same branch. They all deal with sharing information. The distinction is that this information sometimes finds solid ground (instruction).[23] On other occasions the information will meet counterarguments. In such case the sharing of information will be aimed at convincing the other party. Nudging is a bit in the middle. It is the strategic use of information that more or less forces the other to align.[24]

Given this variation what does this 'governance' look like in reality? Below are three examples of homeless issues in three different countries. These examples are derived from a case study looking at three rather different cases. Two in a unitary state (France and the Netherlands) and one in a federal state (USA). Further the cases vary with regard to the type of problem that is tackled, from combating the nuisance caused by homelessness, to finding shelter for an individual or making sure that all the relevant agencies work together. This case study is based on various sources. The aim of this case study is to show the practical functioning of the constitutional framework related to homelessness.

4.2 France: encampments of Roma

A specific problem regarding homelessness is found in relation to the Roma in Western European countries such as France. Roma are regarded as less assimilated since they maintain their own habits and culture. Roma are often associated with criminality and therefore discriminated against. In many European countries there are special social programmes aiming to assimilate this group. In practice these programmes have hardly any effect, since the Roma is not a uniform group.

The problem local governments in France face is that Roma often live in camps in barely humane conditions. In the whole of France there are about 400 camps, of which 153 are in the surroundings of Paris.[25] These camps are located on ground that is either the property of the local government or not intended to be used as a camp site. Local government was therefore under pressure to end these illegal encampments.

In July 2010 the situation of the Roma escalated in the village of Saint-Aignan, in central France. A fatal incident resulted in the death of a young French Romani, shot down by the police. In the following weeks there

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[23] In their book Pressman & Wildavsky show that implementation often fails due to contradictory criteria. See: Jeffrey L. Pressman & Aaron B. Widlavsky, *Implementation. How great expectations in Washington are dashed in Oakland*, Berkely: University of California Press 1973, p. 90.

[24] Richard H. Thaler & Cass R. Sunstein, *Nudge*, New York: Penguin 2009..

[25] 'Nieuwsuur', *NOS/NTR*, 31 oktober 2013.

were riots and disturbances. The local mayor of Saint-Aignan described these disturbances as 'a settling of scores between the travellers and the gendarmerie'.[26] Very soon riots erupted elsewhere, for example in the city of Grenoble.

In this situation the French president Sarkozy announced that his government would end the illegal encampments within three months. Since then many camps have been demolished and inhabitants with a Romanian or Bulgarian passport deported.

What does this case show? First of all, it is a local problem that receives national attention because the president wishes to show his power with a new strict policy. It is clear that the local communities were not happy with the illegal encampments but lacked the means or the instruments to effectively end them. The problem was solved when a policy was introduced that ended with the deportation of groups of Roma.

This is actually only half the story. Many Roma could not be deported to their country of origin. They either had French nationality or European legislation made it impossible to force them to go to Bulgaria or Romania. The expulsion was accompanied with a programme in which Romanian and Bulgarian citizens were given € 300 in exchange for their cooperation in the return process.[27] So apparently the constitutional framework here presents a central government that interferes with a local problem, providing a new instrument (expulsion) accompanied with some extra budget. The main question however is where are the Roma that did not return to Romania or Bulgaria? According to Amnesty International in 2013 still a record number of 10,000 Roma are living on the streets in France.[28]

4.3 Netherlands: the case of the illegal immigrant

The second case deals with an immigrant from Iraq who applied for a residence permit in the Netherlands.[29] After having exhausted all procedures to receive the permit, he was supposed to leave the country. Instead he wandered the streets as one of the many undocumented migrants.[30] He became depressed and used all kinds of medicine. He became so depressed that his lawyer advised him to start a new procedure to receive permission to stay in the Netherlands on humanitarian grounds. During the procedure

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26 'Troops patrol French village of Saint-Aignan after riot', *BBC* 19 July 19 2010.

27 'Brussels blinks in legal row with Sarkozy over Roma expulsion', *The Independent* 30 September 2010.

28 ´Franse crimefighter neemt Roma op de korrel´, *NRC Handelsblad* 28 september 2013.

29 This is an actual case that ended up in a law suit: Rechtbank Zwolle 2 January 2014, Awb 13/1299.

30 E.M.Th. Beenakkers, M.H.C. Kromhout & H. Wubs, *Illegaal verblijf in Nederland. Een literatuuronderzoek*, The Hague: WODC 2008 p. 13-14.

the immigrant would be entitled to shelter offered by the Immigration Office, but it took some time for this application to be officially being considered. In the meantime this illegal immigrant was still without shelter. He therefore he applied for support (shelter) at the municipality.

The municipality is responsible for municipal assistance under the *Wet maatschappelijke ondersteuning* (Municipal Assistance Act (Wmo)). Due to the strict legislation the immigrant would not qualify for any benefits or social services.[31] So the municipality was therefore confronted with a dilemma. On the one hand the legislation is clear: no right to shelter, not even temporary. On the other hand this person was desperate and depressed and shelter would only be temporary.

The solution that the municipality came up with was to reject the application on formal grounds, but in the meantime to refer the undocumented migrant to a civil society organisation that offers temporary shelter for those in need. The municipality subsidises this. So instead of officially offering shelter, the municipality caused others to offer this shelter.

What happened in this case? This Dutch case shows at least three things. In the first place, national legislation seems to increase the problems of homelessness. And in the second place, local governmental bodies appear to be able to find means to solve the problems they face - even if it is more or less against the law. The third observation is that the bill stays at local level. In this case the local government was kind enough to organise shelter provided elsewhere, but this was only possible due to the fact that the civil society organisation was depending on municipal subsidy.

4.4 America: Opening Doors

In the USA a new federal policy programme was launched in 2010 to combat homelessness. This programme, called 'Opening Doors' had one main goal: to prevent and end homelessness.[32] The means to achieve this goal: make sure that all 19 agencies that are involved work together. These agencies vary from the department of labour to the department of interior and even transportation. The United States Interagency Council on Homelessness (USICH) is responsible for the implementation of this programme. The programme involves many 'objectives', such as increasing access to stable and affordable housing. These goals break down into objectives and strategies.

From the plan it is hard to derive what each partner is supposed to do. What is interesting though is that the plan does provide an overview of the funds available to achieve the goals that are in the plan.

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31 See the contribution of Koopmans in this volume.

32 See: <usich.gov/opening_doors>.

4.5 Comparison: the governance of homelessness

The three cases deal with similar problems of homelessness. The involvement of the central and local governments is completely different in each case. In the French case the local government is unable to solve the problem of the encampments, the central government interferes and with strict regulation and money the problem seems to evaporate - though it might also be true that the problem actually shifted towards even more homelessness. The Dutch case shows how national rules do not reflect the problems local governments have to solve. This is an example of positive action by the local government that actually disobeyed the strict rules, or at least found a way to solve the problem in a different manner. The American case shows how the federal government intervenes by trying to coordinate the different governmental bodies. This involvement does not result in individual claims, rights or benefits, but mainly in funds and direction to all the governmental bodies involved.

What all the cases do show is that the central government does not provide a basic level of care and seems not able or not willing to fully solve the problem of homelessness. And if the central government does interfere it is debatable how much this actually contributes to solving the problems of the homeless.

5 Conclusion: fertile ground for social dumping

The constitutional framework constructs a relationship between governmental bodies. Regarding the homelessness this relation is rather complex. If local government wishes to act to end nuisance caused by homelessness it is often bound by (national) legislation. And if the local government wishes to provide shelter or protection, the budget involved is also attached to national strings.

The three cases show that local governments often simply lack the instruments they need to solve the problems at hand. If the central government takes the initiative this is hardly a guarantee that the local governments will have more support in their struggle with the problems they face.

Problems such as these are mainly solved through receiving extra funding or organizing shelter or more sustainable social housing. It is nevertheless understandable that local governments try to avoid generous social programmes. After all, this is not an attractive policy area for ambitious politicians. On the contrary, it could be argued that generous social programmes would indeed attract more homeless people and the problems that accompany this (unsafe situations etc.). This ultimately could become a ‘run to the bottom’. The problems would be solved as they arise without any general policy being formulated with a view to resolving these problems at their source.

The result is 'local dumping' in which local governments limit their involvement to the necessary basics and call upon the 'civil society' as much as possible. These civil society organisations are in the end the organisations that provide shelter to the homeless. This model has some major side effects. First of all the financial support from local governments is often non-regulated. Meaning that it depends on the whims of the local council to what extent this support is provided. In the current era of scarcity and budget cutbacks that makes it a harsh situation.

Secondly, there is a risk that the support provided depends on vague or irrelevant criterion, such as sex, religion or ethnic group. Especially this risk is important from the constitutional perspective because the (central) state is responsible for guaranteeing equal treatment in which protection is not denied on irrelevant grounds.

Chapter 3
The legal infrastructure to combat homelessness in the Czech Republic

Katerina Benasova

1 Introduction

Homelessness is a serious and increasing worldwide social problem. This chapter focuses on the situation of homeless people in the Czech Republic. It analyses the applicable legislation and presents a detailed overview of the social benefits and services available to homeless people. Prague, the capital city of the Czech Republic, is used as an example to illustrate how homeless people are cared for in practice.

There is a connection between the reasons why these people became homeless and the historical development of the country. In 1918, when Czechoslovakia was established, there was a minority of homeless and wandering people. The church, charity associations or centres for poor people administered by a particular municipality took care of them.[1] After 1948, when the communist era began, a crime called *social parasitism*[2] was introduced into the Penal Code. As a result homelessness could no longer be considered a social problem. Anyone categorised as a social parasite (people who had no fixed address without reasonable cause and long-term unemployed people who did not fulfil their moral duty to work) could be prosecuted and imprisoned.[3] Charity associations and centres for poor people were replaced by institutions of social care such as orphanages, dormitories, homes for elderly, sick and disabled people. The role of the church was reduced. Anyone unable to take care of himself was placed in one of the state´s institutions or imprisoned.

This system was abandoned in 1989 with the end of the communist regime. Social problems arose once more following political and economic changes and the issue of homelessness was back on the agenda. The concept of social parasitism as a crime was abolished as was the concept of a person's moral duty to work. Big corporations owned by the state that

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1 P. Tröster et al., *Pravo socialniho zabezpeceni*, Praha: C. H. Beck 2010. p. 27.

2 Originally prizivnictvi.

3 M. Stechova, M. Luptakova & B. Kopoldova, *Bezdomovectvi a bezdomovci z pohledu kriminologie*, Praha: Institut pro kriminologii a socialni prevenci 2008, p. 4.

provided free beds in dormitories for their own workers went bankrupt and *Listina zakladnich prav a svobod*[4] (hereinafter referred to as The Charter of Fundamental Rights and Freedoms) was adopted in the Czech Republic. The Charter guarantees the right to free movement, residence and personal freedom. It can be argued that it is these factors together with the amnesty of prisoners declared in January 1990 during which many political and also non-political offenders were released, some of whom ended up on the streets because they had lost their families or family connections, that are the main cause of the current and growing homelessness problem in the Czech Republic.

There are approximately 30 thousand homeless people in the Czech Republic. It is useful to briefly mention the outcome of the research project on homeless people actively using social services conducted by *Cesky statisticky urad*[5] in 2011.[6] In total almost 12 thousand people were using social services for homeless people during the period of research. According to the presented results, most of these people do not live in Prague (about 1250 people), but in *Moravskoslezsky kraj*, in the eastern part of the state (about 2500 people). The majority of homeless people using social services are men, only 21.5% are women. 47.2% of respondents have been to general or vocational secondary school but did not sit a certified final exam; 2.6% obtained a university degree. 28.5% of the homeless people stated that they were continuously economically active (mainly in manufacturing, construction industry and also as regular workers at warehouses and transport companies), 14.2% of them were already in retirement and 3.1% of respondents have never worked.

As indicated above, approximately 18 thousand homeless people currently living on the streets of the Czech Republic (more than a half) do not take advantage of the social services and benefits available.

2 Research

2.1 Legislation

Legal instruments in the Czech Republic can be divided into binding and non-binding instruments. Although there is no binding legal instrument focusing exclusively on the homelessness issue, general social security legislation (both primary and secondary) does apply. First of all, social

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4 Decision no. 2/1993 Sb., o vyhlaseni Listiny zakladnich prav a svobod jako soucasti ustavniho poradku Ceske republiky.

5 In translation Czech Statistical Office.

6 <www.czso.cz/sldb2011/redakce.nsf/i/vysledky_scitani_bezdomovcu>, last accessed on 22 December 2013.

rights are regulated by The Charter of Fundamental Rights and Freedoms. The fourth chapter of this Charter, governing economic, social and cultural rights, sets out the right of citizens to adequate material security in old age, during periods of work incapacity and in case of breadwinner´s death.[7]This chapter also includes the right of everyone to health protection[8] and the right of everyone in social need to assistance to ensure a basic living standard.[9] These rights can be claimed on the basis of the social security acts regulating them, namely:

> Act no. 117/1995 Sb., *o statni socialni podpore*,[10]
> Act no. 155/1995 Sb., *o duchodovem pojisteni*,[11]
> Act no. 108/2006 Sb., *o socialnich sluzbach*,[12]
> Act no. 110/2006 Sb., *o zivotnim a existencnim minimu*,[13]
> Act no. 111/2006 Sb., *o pomoci v hmotne nouzi*,[14]
> Act no. 329/2011 Sb., *o poskytovani davek osobam se zdravotnim postizenim*.[15]

Non-binding legal instruments are usually programmes or national plans drafted by the government or a municipality. Although these are not legally binding, their influence is strong because the government or a municipality engages experts in the respective fields for drafting the documents and for specific recommendations. The government also refers to these when drawing up its legislative proposals as does a town council in the administration of a city. Czech Republic, as a member of the European Union, is bound by its strategic programme called Europe 2020. On the basis of this strategic programme, a member state is obliged to draft National Reform Programmes, which are updated each year. The up to date version includes a section dealing with ways of combating social exclusion. In particular, the government has undertaken to adopt a special programme called *Koncepce prevence a reseni problematiky bezdomovectvi v Ceske republice do roku 2020* (hereinafter referred to as Programme for preventing and combating homelessness in the Czech Republic; valid until 2020). At a municipal level an example of such a programme is *Koncepce navrhu reseni problematiky bezdomovectvi v Praze v letech 2013-*

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7 Article 30 (1) of The Charter of Fundamental Rights and Freedoms.
8 Article 31of The Charter of Fundamental Rights and Freedoms.
9 Article 30 (2) of The Charter of Fundamental Rights and Freedoms.
10 In translation Act no. 117/1995 Sb., on state social support.
11 In translation Act no. 195/1995 Sb., on pension insurance.
12 In translation Act no. 108/2006 Sb., on social services.
13 In translation Act no. 110/2006 Sb., on minimal income ensuring basic living standard and human existence.
14 In translation Act no. 111/2006 Sb., on assistance in case of lack of material security.
15 In translation Act no. 329/2011 Sb., on providing benefits to disabled people.

2020 (hereinafter referred to as Programme for combating homelessness in Prague between 2013 and 2020).

2.2 Programme for preventing and combating homelessness in the Czech Republic valid until 2020[16]

According to the government decision made in December 2012, the first national Programme on prevention and combating homelessness in the Czech Republic, valid until 2020, had to be submitted by *Ministerstvo prace a socialnich veci*[17] in May 2013. The text was approved in August 2013 and further updated in November 2013 following political changes. While this programme is not a binding legal instrument, as an instrument prepared by a commission of experts it should go some way towards unifying care for the homeless and reference will be made to it when drafting legislative proposals and adopting secondary legislation.

Under the Programme on prevention and combating homelessness in the Czech Republic valid until 2020, measures will be adopted aimed at protecting people from social situations leading to homelessness, at extending the social services and health care offered to homeless people, at easing the chances of returning to a normal way of life and at creating adequate housing opportunities. A new concept 'accommodation need' is discussed. This is similar to the concept 'social need' (meaning a state of living in which a person does not earn sufficient income to secure his or her needs and is unable to improve this by his or her own effort) but refers to the specific situation in which a person is in danger of losing his or her accommodation or has done so already. In such cases social housing shall be provided. This housing is intended to be decent and affordable accommodation built within the scope of a project run by *Ministerstvo pro mistni rozvoj.*[18]

Changes in health care will reflect the fact that only a minority of homeless people has health care insurance. Currently a hospital is allowed to charge non-insured persons for medical treatment. This is partially solved by special health care schemes run by the providers of social services for homeless people but such care is not sufficient. Legislation should stipulate ways of covering medical expenses in these situations or otherwise the right to the protection of health will not be safeguarded.

The programme criticises the fact that many social services are not available for homeless people and that those services that are available are not sufficiently connected by way of follow-up to provide a sound network of social services. The programme puts strong focus on the provision of education, various kinds of courses for targeted people and motivation.

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[16] <www.mpsv.cz/cs/16156>, last accessed on 22 December 2013.

[17] In translation Ministry of Labor and Social Affairs.

[18] In translation Ministry of Regional Development.

2.3 Social benefits available to homeless people

Although the current social security system does not include any schemes specifically targeted at homeless people, the established schemes (social insurance, state social support and social assistance) do provide for benefits to be paid to these people. Social benefits are granted on the basis of an administrative procedure usually initiated by the potential recipient. In other words the potential recipient needs to be properly informed to know what to do. The administrative body has to check whether the conditions specified in the applicable legislation are fulfilled.

People threatened by the possibility of losing their dwelling might receive two kinds of allowances to improve their situation, namely accommodation allowance and supplement for housing. When assessing a claim for accommodation allowance the administrative body takes into account the income of the whole family living together which is then multiplied by a city-related quotient. The result is compared with expected expenses to cover accommodation costs as indicated in the act.[19] If the result is lower than this expected amount, the tax-financed accommodation allowance is granted. The allowance is not available for people living in dormitories. The second benefit, supplement for housing, is provided under a social assistance scheme for people in social need whose income is not sufficient to cover accommodation costs and ensure an adequate level of subsistence at the same time.[20]This is a tax-financed supplement and is also payable to people living in dormitories. The supplement is granted together with a subsistence allowance for persons with a social need that cannot be solved by their own effort. An allowance called exceptional assistance in case of social need may be received in special circumstances such as lack of money to cover daily subsistence needs or when an adult orphan leaves an orphanage.

The social assistance scheme also has a sub-scheme for disabled people, financed from the state budget. However, this scheme is suitable only for a disabled person who needs special equipment to be able to manage daily life or who needs help with his or her own mobility.[21] There is no special measure for disabled homeless people.

The social insurance scheme, in particular the pension insurance sub-scheme, offers a broader scope for assistance.[22] Pensions are payable provided requirements regarding the minimum period of insurance and age are met. As mentioned above, 28.5% of homeless people are economically

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[19] § 26 Act no. 117/1995 Sb., *o statni socialni podpore.*

[20] § 2 Act no. 110/2006 Sb., *o zivotnim a existencnim minimu*.

[21] Act no. 329/2011 Sb., *o poskytovani davek osobam se zdravotnim postizenim*.

[22] Act no. 155/1995 Sb., *o duchodovem pojisteni*.

active and 14.2% of homeless people have already retired. It is therefore possible that the requirements relating to the minimum duration of insurance and age are satisfied and a retirement pension can be granted. There are also other benefits related to pension insurance, such as invalidity pension. To receive invalidity pension the requirements regarding age and duration of pension insurance (minimum of five years for people older than 28 years, the necessary duration is shorter for younger age)[23] must be met and a medical opinion confirming invalidity must be available (decreased ability to work at least of 35% compared to previous health condition). Widow or widower pensions are payable depending on whether the deceased person met the above requirements regarding retirement or invalidity pension and are payable for one year following the death of a spouse. Prolongation of this period is possible, especially if the recipient takes care of a child or is himself disabled.[24] Similar conditions are applied to orphan pensions which are payable until a child is adopted, starts work or reaches 26 years of age.[25] There is a network of orphanages; their purpose is to prevent orphan children from becoming homeless. These children are allowed to stay until they reach 18 years of age, 19 years in exceptional cases. Furthermore, foster-parent/child benefits financed by taxes may be payable for those families who agree to take care of an orphan child.

2.4 Social services available to homeless people

Social services are considered to be the most attractive part of the social security system for homeless people in the Czech Republic. These services are provided either on-site (in the street), ambulatory (homeless people periodically come to the providing facility to receive a service) or residential (recipients temporarily stay in the facility and use a service including accommodation).[26] Homeless people are entitled to free consultations to discuss their situation or they can take advantage of services offered within the scope of social care or social prevention sub-schemes. The system relies on social consultation as a source of information and as a basis for taking further measures. However, it is not very popular among homeless people and therefore awareness is not high. Providers usually try to inform recipients while providing a particular service. Social care services generally include day care centres, guiding and reading for disabled people aimed at helping them with necessary personal matters and homes for disabled and elderly people (these services are residential, paid per day of stay, usually with three meals

[23] § 40 Act no. 155/1995 Sb., *o duchodovem pojisteni.*
[24] § 49 Act no. 155/1995 Sb., *o duchodovem pojisteni.*
[25] § 52 Act no. 155/1995 Sb., *o duchodovem pojisteni.*
[26] § 33 Act no. 108/2006 Sb., *o socialnich sluzbach.*

per day and medical treatment by professional staff).[27] Social prevention services include for example on-phone crisis assistance for people at risk, translation services mostly for deaf-mute people but also available for migrants, temporary housing and related services usually with a food supply and social inclusion programmes, over-night dormitories, follow-up care for people undergoing various kinds of therapy, social integration programmes for elderly and disabled people, therapeutic workshops offered during the provision of other services and most importantly on-site programmes often aimed at providing people in need with food and clothes or ensuring their social contacts and social rehabilitation with a view to restoring a normal way of living, independence and the ability to take care of their own needs.[28]

Migrants are also eligible for benefits and services in the Czech Republic provided they fulfil the necessary conditions,[29] permanent residency and actually living in the territory of the Czech Republic is often required. Legally staying migrants who do not meet those conditions are entitled to take advantage of temporary housing and on-site programmes.[30]

The organization and administration of social services is decentralized; it is based on three levels. On the top, *Ministerstvo prace a socialnich veci*[31] makes national plans and programmes and grants subsidies to private providers. Municipalities and regions are more active; they grant permits to providers of social services in their territory and register them. Both have a duty to take care of the well-being of their inhabitants, therefore they are obliged to monitor whether the variety of social services is sufficient to satisfy the need in the territory and point out which services are absent. They could also establish social organizations themselves or donate money to them, both often engage in seeking temporary housing options. Care of homeless people is not unified and therefore differs in each city. Private persons play a major role as providers of social services; a variety of services can be offered simultaneously.

The problematic element of financing social services is that only part of the services is subsidized by the state, the other part has to be paid by the recipient himself or by the provider from its budget. The list of charged services is contained in the act[32] and includes for example various homes for disabled or elderly people, temporary housing and over-night dormitories.[33] In other words, services that can be designated as key for homeless people

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27 § 38 - § 52 Act no. 108/2006 Sb., *o socialnich sluzbach.*

28 § 53 - § 70 Act no. 108/2006 Sb., *o socialnich sluzbach.*

29 § 3 Act no. 329/2011 Sb., *o poskytovani davek osobam se zdravotnim postizenim*, § 5 (1) Act no. 111/2006 Sb., *o pomoci v hmotne nouzi*, § 4 (2) Act no. 108/2006 Sb., *o socialnich sluzbach*.

30 § 4 (2) Act no. 108/2006 Sb., *o socialnich sluzbach.*

31 In translation Ministry of Labor and Social Affairs.

32 § 73 Act no. 108/2006 Sb., *o socialnich sluzbach.*

33 § 73 Act no. 108/2006 Sb., *o socialnich sluzbach.*

have to be paid by the recipient. There is a benefit that partially helps to cover the costs of social services. A person (older than 1 year) eligible to use social services in the Czech Republic and dependent on care of others (meaning that a person needs help in daily life, for example with hygiene or cooking), is entitled to apply for care allowance.[34] Furthermore, the fact that a particular service is not covered by subsidies does not necessarily mean that a recipient will be obliged to cover the costs; the provider can be sponsored (by a municipality or a private sponsor). In addition, *Ministerstvo prace a socialnich veci*[35] offers help for providers with submitting applications to the European Social Fund. It is possible to receive money in order to educate employees and also to widen the variety of services offered within the scope of this subsidy programme.

2.5 Situation in Prague

Prague is the capital city of the Czech Republic and a separate region. The city's social policy has its own plans and a separate Programme for combating homelessness in Prague between 2013 and 2020.[36] Prague supports social services provided by private persons, establishes its own institutions and employs special civil servants to provide social consultancy within its administrative agency. These employees are social curators for children and adults. For adults the curators provide professional consultancy to socially excluded people or to people who are at risk of being socially excluded. Typically the curator takes care of people leaving prisons, detention, therapy or orphanages and also helps homeless people if they are willing to discuss their situation and try to find a solution. In Prague, there is one curator for each of the 22 districts. Consultation is free but is not often taken up by homeless people since the curator can only offer consultation or discussion about future action; whether the person follows the guidelines or not depends on the recipient of consultancy service.

According to the Programme for combating homelessness in Prague between 2013 and 2020, the social services provided to homeless people in the territory of Prague include various kinds of temporary housing, day centres, over-night dormitories, on-site programmes and social rehabilitation:

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34 § 7 Act no. 108/2006 Sb., *o socialnich sluzbach*.

35 In translation Ministry of Labor and Social Affairs.

36 <www.praha.eu/public/11/dd/1c/1456401_300534_Koncepce_navrhu_reseni_problematiky_bezdomovectvi_v_Praze_v_letech_2013_2020.pdf>, last accessed on 22 December 2013.

Social service	No. of providers in Prague	Capacity of the provider
Temporary housing	29	838 clients
Day centres	4	500 clients
Over-night dormitories	5	367 clients
On-site services	3	174 clients per day
Social rehabilitation	2	152 clients

There is a significant lack of capacity. According to the research by *Cesky statisticky urad,*[37] mentioned earlier, there are almost 1300 homeless people in the territory using the available social services and each existing social service has a capacity for more or less hundreds of clients (as noted in the chart above). The lack of capacity is most urgent in relation to over-night dormitories. Additional capacity is added during winter with the financial support of the municipality, usually in the form of huge tents with heating inside or old boats on the river Vltava; such a solution is not sustainable. Services focusing on disabled homeless people and effective preventive measures at municipality level are not established. There are plans for new shelters and day centres as well as discussions about the gaps in variety social services.

There are many providers of social services in Prague; below is a list of those who form the core of social care for homeless people and those who have interesting ideas and solutions.

Nadeje (meaning *hope* in Czech) is one of the well-known providers. Its integration programme is designed to help people in the street in different ways. Services offered by *Nadeje* are broad, including ambulatory, on-site and residential services. On-site work particularly covers food, drinks and hygienic accessories, day centre with educational, requalification and social rehabilitation programmes, dormitories and temporary houses, health care, translating, counselling, religious services, socialization places and clothes. *Nadeje* owns special cars for the purpose of food supply services. These services are often used by homeless people who do not want to receive help offered in day centres. Together with supplying food, the employees motivate recipients to try follow-up care. It also has a programme dedicated to health care which includes a medical practice intended only for homeless people, curing various diseases to prevent their transmission and health education. Patients are welcomed during opening hours. A patient may take a shower and use hygienic equipment before having a medical check-up. Special attention is dedicated to viral diseases, tuberculosis and hepatitis. Mostly skin diseases are treated. Appointment can be made with a psychologist.

[37] In translation Czech Statistical Office.

Another significant provider is *Arcidiezni Charita Praha*, which established a day centre offering counselling services and an over-night dormitory in Prague. Homeless people can receive food, change their clothes and consult about their situation there. An on-site food supply programme has been organized with the help of the European Social Fund subsidy. An over-night dormitory for short and longer periods of time is available at a fee.

Zpet do prace (meaning Back to work) was an interesting integration programme focused on homeless people. Although the project finished in August 2013, it inspired other regions. The programme was intended to requalify homeless people and help them to re-join the labour market. Participants received so called food checks (checks that might be exchanged for food only) in the value of CZK 70[38] per day of participation. There were 40 requalification courses offered to homeless people, the most popular were manual and social works. If a company decides to employ a requalified homeless person, it will receive 40% of the minimal wage[39] as a contribution for six months. This opportunity is used mainly by construction and cleaning companies in Prague.

Potravinova banka is an organization which distributes donated food to be served free of charge in cafeterias run by social services providers, especially day centres, over-night dormitories and temporary housing facilities. Furthermore, there is also an interesting way for homeless people to earn a little money offered by *Pragulic*. Homeless people can join the project and become guides of tourists curious to see Prague from the perspective of a homeless person.

3 Conclusions

There are almost 30 thousand homeless people in the Czech Republic. Although homelessness is a serious social issue across the world, it could be called a relatively recent phenomenon in the Czech Republic due to its historical development. During the Communist era people in trouble were either placed in one of many social institutions or prosecuted and imprisoned for a crime called social parasitism. The end of the regime in 1989 brought political and also economic changes; homelessness is an unfavourable consequence of this.

According to my research, the current system does not include any particular schemes targeted only to homeless people, but offers social benefits and services that they may apply for. Furthermore, social consultancy about

[38] Approximately € 3.

[39] Approximately CZK 3,200 (€ 123).

particular situations, aiming to provide support and information, is always available free of charge. However, more than a half the people living on the streets of the Czech Republic do not claim these benefits and services.

This is caused mainly by a lack of awareness about opportunities available to homeless people. They are not motivated to consult about their situations because this is not immediately advantageous. The other significant problem is that most of the services available for homeless people are charged. Social benefits (together with care allowance aiming to cover a part of recipient's costs paid for a social service) may be claimed provided that prescribed conditions are fulfilled. However, the administrative procedure might be confusing and complicated; it requires the recipient to be properly informed. Providers of charged services can be sponsored by a municipality or a private sponsor, but often not enough to extend their capacity in order to meet real demand. In addition, social care targeted to disabled homeless people does not exist at all and it is very difficult to receive medical treatment free of charge without health insurance.

The situation in practice was shown in an example of Prague. Prague has one of the most comprehensive systems, including its own Programme on combating homelessness for Prague between 2013 and 2020. According to my research a variety of service providers operate in the territory, the city itself has special social consultants, establishes its own institutions and donates money from its budget each year to help providers cover the costs of social services for homeless people. Prague also engages in seeking for new capacities, especially in winter the city offers additional temporary accommodation. Nevertheless, problems with lack of capacity are persistent due to high demand and some social services are still unavailable. The municipality helped to launch a project for the requalification of homeless people, which motivated homeless people by giving them food checks in exchange for their participation.

However, a change of system is expected. The first national Programme on preventing and combating homelessness in the Czech Republic valid until 2020 adopted in August 2013 and updated in November 2013 introduces new measures to broaden the social services currently available to homeless people (including health care), target and help those at risk of losing their accommodation and a brand new separate scheme, the so called 'accommodation need' will be adopted within the scope of a social housing project. In my opinion, the reconsideration of social services to be subsidized in future is also advisable. Motivation through checks (preferably checks with validity extended to social services) can be employed in order to make social consultancy more interesting for homeless people. It would be easier for homeless people to receive them than applying for social benefits. The nature of checks would prevent spending money on cigarettes or gambling. Consequently, a better availability of funds would motivate recipients to use

a social service and therefore providers would be encouraged to extend their capacity and services.

Chapter 4
The right to housing as a constitutional imperative; the situation in Canada

Elizabeth Perreault

1 Introduction and legal sources

According to the United Nations Organisation, homelessness is 'perhaps the most visible and most severe symptom of the lack of respect for the right to adequate housing'.[1]

The lack of adequate affordable housing has been a problem in the Canadian province of Quebec for the last decade. Indeed, as the price of rent keeps increasing drastically, less housing is available for individual in needs. For instance, in 2000, the average monthly rent for an apartment in Montreal was $496.97 (€ 378.93). In 2010, the average monthly rent was 665$ (€ 507), an increase of 33.95%.[2] For the same time period, the normal inflation rate was 21.94%[3] in Canada, meaning that rent increase exceeded the normal inflation rate. Although housing is clearly an issue in Canada, it is shockingly the only country in the G8 group of industrialised nation without a national housing strategy.[4]

This chapter will first define the right to housing by referring to international law instruments such as the *Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Secondly, it will explain why it is not included directly in Canadian legislation such as the Constitution Act even if a bill was presented recently to establish a national housing policy. Then, the main governmental agencies will be presented, thus allowing us to better understand how homelessness and the right to housing are handled in Canada. Fourthly, the legal remedies and the issue of housing-related discrimination will be covered. Finally, the issues of

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1 UN Office of the High Commissioner of Human Rights (OHCHR), *Fact Sheet No 21, The Human Right to Adequate Housing,* November 2009, Fact Sheet No. 21/Rev. 1, available at: <ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf>, last accessed on 2 January 2014.

2 M. Bendaoud, Le droit au lodgement tel que vu par le PIDESC: sa mise en oeuvre est-elle conforme?, *Revue québécoise de droit international* 2010 (3), p.73.

3 Bendaoud 2010, p. 73.

4 Canada Without Poverty, *Renewed call for a national housing strategy*, 17 February 2012, <www.cwp-csp.ca/2012/02/renewed-call-for-a-national-housing-strategy/>, last accessed on 3 January 2014.

homelessness and the lack of affordable housing will be discussed.

Throughout this chapter, numerous instruments of international law will be used, this in order to better understand how we can compare Canada's situation with other countries.

2 Defining adequate housing and the right to housing

Although some countries do not fully recognise the right to housing as a human right, numerous United Nations members declared that housing was a fundamental need which should be fulfilled in order to ensure society's best interests.[5] It is also recognised in section 25 of the UN's *Universal Declaration of Human Rights* of 1948.[6]

In 1976, Canada joined the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), a legally binding treaty urging member states to make progress in protecting numerous rights, including the right to adequate housing. Indeed, section 11 of the covenant reads:

> The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including *adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.*[7]

The term 'adequate housing' is quite hard to define, as it is multidimensional. According to the Commission on Human Settlements, it notably includes privacy, lighting and infrastructure.[8] Adequate housing should also include affordability, habitability, accessibility and cultural adequacy.[9]

The right to adequate housing has to be interpreted as the right to have a safe place to live, where one can live peacefully and with dignity.[10] It applies to all individuals, whether they live alone or with their families. This does not imply that governments should provide free housing to everybody in

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5 Human Rights Education Association, *The right to housing*, 2003, <www.hrea.org/index.php?doc_id=411>, last accessed on 3 January 2014.

6 *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948), s. 25(1).

7 International Covenant on Economic, Social and Cultural Rights, 16 Dec 1966, [1976] R.T. Can n°46, s. 11(1).

8 UN General Assembly, *Global Strategy for Shelter to the Year 2000 : resolution / adopter by the General Assembly*, 20 December 1988, A/RES/43/181, available at: <www.un.org/documents/ga/res/43/a43r181.htm>.

9 Human Rights Education Association 2003.

10 Human Rights Education Association 2003.

need or build houses for all inhabitants.[11] They should, however promulgate a strategy to improve conditions of living, thus meeting the objectives of section 11 of the ICESCR.[12]

3 The right to housing in Canadian legislation

Despite Canada's ratification of the IESCR, the right to housing is not protected *per se* in the country's legislation. Indeed, in order for international law to be applicable in Canadian tribunals, it has to be incorporated into national law.[13] As Canada is a federation, there are two main levels of governments: the federal one and the provincial one.

3.1 Canadian constitution

The right to adequate housing is not mentioned in the Canadian constitution.[14] However, it has been argued that it is included in the *Canadian Charter of Rights and Freedom*.[15] Because of Canada's participation in the ICESCR, many believe that the right to housing should be included in the right to security, as one cannot be safe without a proper shelter, especially considering Canada's cold weather. This position is strengthened by the fact that the Supreme Court of Canada has recognised that the Charter should be interpreted in order to ensure compliance to Canada's international engagements.[16]

> Section 7 of the Charter of Rights and Freedoms states:
> Everyone has the right to life, liberty and *security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental* justice.[17]

3.2 Federal laws

No federal law directly protects the right to housing. Unfortunately, in February 2013 a new bill aiming to protect this right was shut down by the

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11 OHCHR 2009, p.6.

12 International Covenant on Economic, Social and Cultural Rights, 16 Dec 1966, [1976] R.T. Can n°46, s. 11(1).

13 Bendaoud 2010, p. 93.

14 *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

15 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

16 Supreme Court of Canada, 09 July 1999, *Baker v. Canada (Ministry of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, par 69-70.

17 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s. 7.

Conservative party.[18] Indeed, Bill C-400[19] would have established a national housing policy and would have required the cooperation of both federal and provincial governments in order to eliminate homelessness.

3.3 Provincial laws

Quebec adopted its own charter of human rights, the *Quebec Charter of Human Rights and Freedom* (hereafter '*Quebec Charter*').[20] Section 45 of the *Quebec Charter* states:

> Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an *acceptable standard of living*.

Even if the right to an acceptable standard of living is mentioned, it does not give the government a positive obligation to act in order to eradicate homelessness or poor living conditions.[21]

The *Code Civil du Québec*[22] provides all the obligations and rights of both the tenant and the lessor. It notably covers habitability, the obligation to pay, and the good state of repair of the premises.

Furthermore, the *Act to combat poverty and social exclusion*[23] provides a guideline[24] to facilitate 'availability to decent and affordable housing through housing assistance programs'.

4 Main bodies involved in the right to housing and the fight against homelessness

Throughout the country, numerous charitable organisms were created to help people in need have access to adequate housing. Here is a list of the organisms involved in Quebec.

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18 All parties were in favor of the bill except for the Conservative party, which is majoritarian.

19 Bill C-406, An Act to ensure secure, adequate, accessible and affordable housing for Canadians, 1st Sess, 41th Parl, 2012.

20 Charter of Human Rights and Freedoms, L.R.Q., c-12.

21 Bendaoud 2010, p. 65.

22 Code Civil du Québec, L.Q., 1991, c. 64.

23 Act to combat poverty and social exclusion, L.R.Q., c. L-7.

24 Bendaoud 2010, p. 65.

4.1 Bodies financed by the federal government

The main federal housing agency is the Canadian Mortgage and Housing Corporation (CMHC). Among other things, this organism is in charge of ensuring that low budget families can be owners of affordable homes by improving access to suitable housing and by investing over $CAD1.7 billion annually to help them pay their houses.[25]

The Homelessness Partnering Strategy (HPS) is a community-based program providing direct support in order to eradicate homelessness. In 2013, the federal government announced that it would give $CAD 119 million per year over five years to finance that project, using a 'housing first' approach. The aim of this approach is to move homeless individuals from the streets to stable housing, while providing the medical assistance they deserve.[26]

4.2 Bodies financed by the provincial government

The *Société d'habitation du Québec* (SHQ)[27] is the CMHC's equivalent on the provincial level. The SHQ works closely with the Quebec government to facilitate access to adequate housing and provides low cost rental opportunities to people in need.[28]

4.3 Bodies financed by both levels of government

In the province of Quebec, several low rental apartments are available for people in need. To be eligible, a person's income must be below a certain amount fixed by the government.[29] For instance, to get such a low rental apartment in Montreal, a single person's annual revenue must be below $CAD 13 500 (€10 200). In 2013, the poverty line for a single person in Canada is around $CAD 15 478 (€11 700).[30] These types of apartments are occupied by elderly (55%), families (43%) and by people with special needs (2%).[31]

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[25] For more information <www.cmhc-schl.gc.ca>, last accessed on 30 December 2013.

[26] Department of Finance Canada, *Jobs Growth and Long-Term Prosperity: Economic Action Plan 2013,* Ottawa: Government of Canada Publications, 2013, p. 228, available at <www.budget.gc.ca/2013>, last accessed on 30 December 2013.

[27] Translation: 'Housing Corporation of Quebec'.

[28] Société d'habitation du Québec, *Rapport annuel de gestion 2012-2013,* Québec : Bibliothèque et Archives Nationales du Québec, 2013, p. 14.

[29] By-law respecting the allocation of dwellings in low rental housing, R.R.Q., c. S-8, r.1.

[30] G Fréchet, La pauvreté, les inégalités et l'exclusion sociale au Québec : vers l'horizon 2013, Québec : Centre d'étude sur la pauvreté et l'exclusion, 2011.

[31] S Leduc, *Profil des locataires et des ménages en attente d'un logement social,* Bulletin d'information de la Société d'habitation du Québec, Vol. 5 n°1, 2010

Low income individuals who spend an important part of their income on lodging can count on the help of *Allocation-Logement.*[32] This financial help was created to help individuals over 53 years old and families with at least one child.[33] In 2013, over 105 000 households in Quebec benefited from that allowance.[34]

5 The right to housing in legal proceedings

Even if the right to housing is not recognised in itself in Canadian laws, tenants still have a right to an adequate living environment. In Quebec, an administrative tribunal called the *Régie du logement*[35] is in charge of hearing all cases related to housing, except those regarding discrimination. The fight of discrimination is a key issue and is provided for in the *Quebec Charter* and in section 2 of the ICESCR. Indeed, the elimination of discrimination is essential to ensure quality in access to adequate housing.

When confronted with a discriminatory situation, one can file a complaint[36] at the *Commission des droits de la personne et des droits de la jeunesse du Quebec* (CDPDJ).[37] In 2013, cases of discrimination in the housing sector represented 10% of the CDPDJ's files.[38] The principal causes of discrimination in the housing sector are age, ethnic origin and disabilities. The CDPDJ has many powers and can even condemn the lessor to punitive damages if he is found guilty of discriminatory practices.[39] However, patience must prevail, as it can take up to 384 days to go to court.[40]

6 Landmark cases

In 2010, four individuals and several organisms filed a motion against both the federal and the Ontarian government to get them to implement policies to reduce and eliminate homelessness and inadequate housing.[41]

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32 Translation: 'Shelter Allowance Program'.
33 Leduc 2010, p. 68.
34 Leduc 2010, p. 3.
35 Translation: 'Housing authority of Quebec'.
36 See <www.cdpdj.qc.ca/en/Pages/default.aspx> for more information.
37 Translation: 'Committee on Human Rights and Youth'.
38 Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2012-2013*, Québec : Bibliothèque et Archive Nationales du Québec, 2013, p.55.
39 J-L Baudoin & P-G Jobin, *Les obligations 6e ed,* Cowansville (Qc): Yvon Blais 2005, p. 901.
40 Baudoin & Jobin 2005, p. 59.
41 Ontario Superior Court, 06 September 2013, *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410.

The applicants mainly claimed that both levels of government had a positive obligation to put in place policies to ensure adequate housing for all Canadians.[42] To support their position, they relied on section 7 of the *Canadian Charter*, which protects the right to life, liberty and security of the person and on section 15 of the *Canadian Charter*, which ensures that every individual is equal before and under the law. The applicants held both governments accountable for the lack of adequate housing because they made changes to existing programs or took decisions without previously considering the impact it would have on vulnerable groups, such as homeless people.[43] For instance, from the 1960s until the 1990s, a general policy urging the de-institutionalisation of people with psycho-social or intellectual disabilities was implemented throughout Canada, often leaving those affected by these policies without adequate housing in their communities.[44]

The government of Canada and the government of Ontario (hereafter 'the respondents'), claimed that they did not have any obligation to act on the matter, as there is no freestanding right to adequate housing.[45] Indeed, for section 7 of the *Charter* to be violated, there has to be a breach of the rights prescribed *and* the breach has to contravene to principles of fundamental justice.[46] According to the government, it was not the case in the present situation. Furthermore, the respondents claimed that section 15 of the *Charter* cannot be breached, because nothing suggests that other citizens are given advantages that are being denied to the homeless, or that the homeless have obligations that others do not have.[47]

The case was heard in May 2013. Unfortunately, in September 2013, the Superior Court of Ontario chose to side with the government and dismissed the case. Justice J. Lederer ruled that although the project served a desirable end,[48] the court was not the proper place to discuss the issue.[49] In other words, the implementation of a policy by the Superior Court would 'cross institutional boundaries and enter the area reserved for the Legislature'.[50]

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42 Ontario Superior Court, 06 September 2013, *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410, par 2.
43 *Ibid*, par 21.
44 *Ibid*, par 23.
45 *Ibid*, par 32.
46 *Ibid*, par 30.
47 *Ibid*, par 108.
48 *Ibid*, par 4.
49 *Ibid*, par 143.
50 *Ibid*, par 147.

At least one of the applicants, The Advocacy Centre for Tenants Ontario, intends to file an appeal.[51]

7 Homelessness and the lack of affordable housing

Due to severe government cuts in social programs in the second half of the 20th century and to a constant increase in the cost of housing, less and less low income people can afford adequate housing in Canada,[52] ultimately resulting in an increase of homeless individuals.[53]

Although there is no official data on the matter, the number of individuals experiencing homelessness in Canada on a given year has been estimated to be between 150 000 and 300 000,[54] a number that was shocking to the UN. Indeed, in 2006, the UN's Committee on Economic, Social and Cultural Rights assessed Canada's compliance to the ICESCR and expressed concern regarding the high number of homeless persons[55] and the lack of affordable housing.[56]

Several factors can explain why people find themselves homeless. As it is often the case, some groups are more likely to suffer from homelessness than others, such as drug addicts or individual suffering from mental illness.[57] Aboriginal people are also over-represented in the homeless population, even if they only represent 6% of the total Canadian population.[58] Young people aged between 16 and 24 years old and adult men aged between 25-55 years respectively make up 20% and 47.5% of the homeless population.[59]

Another factor contributing to the increase of homelessness is the lack of affordable housing.[60] Housing is considered affordable if people are paying less than 30% of their annual income on lodging. Over 27% of Canadians are living in 'core housing need', meaning that they are spending more than 30% of their income on housing, while their annual revenue is below

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51 Advocacy Centre for Tenants Ontario, *Right to Housing Challenge Case Update : What's happening now*, 2013, available at <www.acto.ca/en/cases/right-to-housing/case-update-whats-happening-now.html>, last accessed on 05-01-2014.

52 S. Gaetz, J Donaldson, T Richter & T Gulliver, *The State of Homelessness in Canada 2013*, Toronto: Canadian Homelessness Research Network Press 2013, p. 14.

53 Gaetz, Donaldson, Richter & Gulliver 2013, p. 16.

54 Gaetz, Donaldson, Richter & Gulliver 2013, p. 16.

55 Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by State Parties Under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights - Canada, 1-19 May 2006, E/C.12/CAN/CO/4-5, point 29.

56 *Ibid*, point 29.

57 Gaetz, Donaldson, Richter & Gulliver 2013, p. 13.

58 Gaetz, Donaldson, Richter & Gulliver 2013, p. 26.

59 Gaetz, Donaldson, Richter & Gulliver 2013, p. 26.

60 Gaetz, Donaldson, Richter & Gulliver 2013, p. 16.

the national median income.[61] On the other hand, there is a shortage of affordable housing, with a vacancy rate of about 2.8% countrywide.[62]

Over the years, numerous solutions have been proposed to fight homelessness and increase affordable housing. Authors recommend that all level of governments (municipal, provincial and federal) should work closely together to come up with concrete plans to eradicate homelessness.[63] Governments should also invest in research and introduce comprehensive data collection in order to better understand the reality they are confronted to.[64]

8 Conclusion

Although Canada ratified the *International Covenant on Economic, Social and Cultural Rights*, a legally binding instrument which was adopted to ensure that countries take appropriate measures to protect numerous rights, including the right to adequate housing, it still fails to include proper measures in its national law. This right is currently neither protected by the Canadian Constitution nor by the charters, even though the rights to life and security are.

Recently, a new bill was proposed to establish a national housing policy. Even if the bill was supported by all political parties, the majoritarian Conservative government did not adopt it, mainly because it did not want to invest money in the issue.

Unfortunately, in late 2013, a court of justice dismissed a case regarding the right to housing, stating that it was mainly a political issue. Indeed, the judge believed that the homeless' right to security was not breached, and that they were not victim of discrimination.

Although the right to housing is not recognised *per se* in Canadian law, several tools are in place to fight any discrimination that might occur in a housing situation. Indeed, when confronted to a discriminatory situation, such as a refusal to lease based on age or race, one can file a complaint at the *Commission des droits de la personne et des droits de la jeunesse du Quebec*. The faulty lessor can be condemned to pay punitive damages to his victim.

Hopefully the Conservative government will realise that it is more expensive in the long term to keep people in the streets or in poor living conditions, as homelessness costs Canadians approximately $7.05 billion a year in emergency shelters, social services, health care and corrections.[65]

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61 Gaetz, Donaldson, Richter & Gulliver 2013, p. 17.
62 Gaetz, Donaldson, Richter & Gulliver 2013, p. 18.
63 Gaetz, Donaldson, Richter & Gulliver 2013, p. 40.
64 Gaetz, Donaldson, Richter & Gulliver 2013, p. 41.
65 Gaetz, Donaldson, Richter & Gulliver 2013, p. 33.

Part III
Homelessness, public order and criminal law

Chapter 5
Tackling anti-social behaviour and homelessness with exclusion orders in the Netherlands, Belgium, England and Wales

Michel Vols & Dewi Duran

1 Introduction

Local governments throughout the world have been tackling anti-social behaviour for years.[1] Homelessness and nuisance on the streets are often bracketed together. They are typically associated with drug and alcohol addiction, anti-social behaviour and crime.[2] The anti-social behaviour consists of begging, answering the calls of nature in porches , sleeping in public, leaving syringes lying around and theft.

Many local authorities see this anti-social behaviour as being so unacceptable that they seek to intervene. Thus, for example, in the Netherlands local government councils have issued by-laws prohibiting begging.[3] In Belgium, England and Wales local government has also taken measures.[4] A popular measure is to impose an exclusion order on homeless people after they have disturbed the public order or violated a local by-law.[5]

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1 See K. Beckett & S. Herbert, *Banished: The new social control in urban America*, New York: Oxford University Press 2009; J. von Mahs, 'The Sociospatial Exclusion of Single Homeless People in Berlin and Los Angeles', *American Behavioral Scientist* 2005 (48), p. 928-960; B. Belina, 'From Disciplining To Dislocation: exclusion orders in Recent Urban Policing in Germany', *European Urban and Regional Studies* 2007 (14), p. 321-336.

2 See E. Lindeman et al., *Daklozen in Amsterdam*, Amsterdam: Dienst O+S 2004, p. 53-59; A.M Donley, The perception of homeless people: Important factors in determining perceptions of the homeless as dangerous, Ann Arbor: Proquest 2008.

3 See Hoge Raad 15/06/2010, ECLI:NL:HR:2010:BL3179, <www.rechtspraak.nl>.

4 See E. Devroe, *A swelling culture of control? De genese en toepassing van de wet op de gemeentelijke administratieve sancties in België*, Antwerpen & Apeldoorn: Maklu 2012, p. 427; Administrative Litigation Section of the Belgian Council of State 14 February 2012, no. 217.930, <www.raadvst-consetat.be/>; P. Butler, 'Westminster council U-turn saves soup runs for homeless people', *The Guardian* 2 November 2011.

5 See Gerechtshof The Hague, 21 March 2006, ECLI:NL:GHSGR:2006:AV6352, <www.rechtspraak.nl>; Hoge Raad, 11 March 2008, ECLI:NL:HR:2008:BB4096, <www.rechtspraak.nl>; ABRvS (Council of State) 4 May 2011, ECLI:RVS:2011:BQ3446, <www.rechtspraak.nl>; S. Moore, 'Street life, neighbourhood policing and the community', P. Squires (ed.), *ASBO Nation*, Bristol: Policy Press 2008, p. 182-184; Beckett & Herbert 2009, p. 14.

The exclusion order is a ban imposed on an individual prohibiting him or her from being in a specific area within the local authority or from being within a particular distance from some object within the local authority.[6]

Local government does not impose the exclusion order under criminal law. In the Netherlands and Belgium the order is imposed under administrative law and in England and Wales under private law. Local authorities do not consider criminal law to be effective in tackling anti-social behaviour.[7] Non-criminal procedures make it possible to bypass strict procedural requirements. Criminal law generally still has a part to play in the enforcement of the exclusion order.

The use of the exclusion order comes in for some criticism. Critics argue that an exclusion order is a 'criminal charge' and that all the conditions under Article 6(2) and (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) should be met.[8] By applying administrative law and private law essential legal safeguards are bypassed: 'the presumption of innocence, the right to be informed promptly of the nature of the charge, the right to adequate time and facilities for defence, the right to legal assistance, the right of confrontation, and the right to an interpreter'.[9]

Local authorities maintain that an exclusion order is not a criminal charge. They base their argument on the criteria applied by the European Court of Human Rights when assessing whether there is question of a criminal charge: the legal qualification of the criminal fact according to national law, the nature of the offence and the severity of the sanction.[10] This has mixed success in the national courts. In the Netherlands, England and Wales the

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6 See A. Millie, Anti-social Behaviour, Maidenhead: Open University Press 2009, p. 109. Cf. A. von Hirsh & C. Shearing, Exclusion from public space, in A. von Hirsh et al. (eds.), Ethical and social perspectives on situational crime prevention, Oxford: Hart Publishing 2000, p. 77-96.

7 See A. Ahsworth & L. Zedner, 'Defending the criminal law: reflections on the changing character of crime, procedure, and sanctions', *Criminal Law and Philosophy* 2008 (2), p. 23 & 36; M. Vols, *Woonoverlast en het recht op privéleven*, Den Haag: BJu 2013, p. 201-202.

8 See C. Bakalis, 'Asbos "Preventative" orders and the European Court of Human Rights', *European Human Rights Law Review* 2007 (4), p. 427-438. See also A. Ashworth, 'Social control and anti-social behaviour: the subversion of human rights?', *Law Quarterly Review* 2004 (120), p. 273; Ahsworth & Zedner 2008, p. 45; R. M. White, 'Civil penalities: oxymoron, chimera and stealth sanction', *Law Quarterly Review* 2010 (126), p. 593-616.; A. Ashworth & L. Zedner, 'Preventive Orders: a problem of undercriminalization', in: R.A. Duff et al. (eds.), *The boundaries of the criminal law*, Oxford: Open University Press 2010, p. 59-87.

9 See Ahsworth & Zedner 2008, p. 48; M.L. van Emmerik & T. Barkhuysen, 'Öztürk. Punitieve sancties en EVRM-waarborgen', in: *AB Klassiek*, Deventer: Kluwer 2009, p. 114-123.

10 See ECHR 21 February 1984, nr. 14949/03 (Öztürk v. Germany), paragraph 50.

local authorities manage to convince the highest courts that an exclusion order is not a criminal charge. In Belgium they are not so successful: the Belgian *Raad van State* (Council of State) considers the exclusion order to be a criminal charge.

This chapter compares the exclusion order in the Netherlands, England and Belgium for the purpose of finding answers to a number of questions. Will the ECHR also conclude that an exclusion should not being regarded as criminal charge? What are the advantages and disadvantages of an exclusion order not being regarded as a criminal charge? What are the implications of the legal qualification of the exclusion order for respect for the rights of homeless people and the effective tackling of anti-social behaviour?

This chapter is divided into four parts. The first part addresses the exclusion order in the Netherlands. The different statutory bases are analysed and the legal status of the order is examined. The second and third part look at the Belgian and English exclusion orders in the same way. The fourth part is a comparative evaluation of the exclusion orders.

2 Exclusion orders in the Netherlands

In the Netherlands the mayor is charged with maintaining public order. The exclusion order is one of the tools available to him for performing this duty. The power of the mayor to impose an exclusion order for the purpose of maintaining public order has several statutory bases.

The mayor often derives his authority to impose an exclusion order from a local government by-law.[11] The city council can adopt a by-law authorising the mayor to impose an exclusion order on disturbers of public order. Typically city councils have included a provision in the *Algemeen Plaatselijke Verordening* (General Local By-law) giving the mayor this power. There are two different kinds of provisions that may be included in such a by-law. The first kind gives the mayor the power to impose an exclusion order in the event of a violation of an explicit instruction set out in the by-law. The second kind gives the mayor the power to impose an exclusion order if such is necessary in the interests of public order or to prevent anti-social behaviour.[12]

Another statutory basis for an exclusion order is the power to issue orders contained in Article 172(3) of the *Gemeentewet* (Dutch local government act). Under this article temporary measures of a not too radical nature can be taken. In order to use this power there must be question of a (potential) disturbance of public order. This power is applied less and less frequently because this provision can no longer form grounds for an exclusion order

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[11] See for example Rechtbank Amsterdam 23 December 2001, ECLI:NL:RBAMS:2011:BV1671, <www.rechtspraak.nl>.

[12] See J.G. Brouwer & A.E. Schilder, 'Gebiedsontzeggingen in het systeem van het openbare-orderecht', *Jurisprudentie Bestuursrecht plus* 2007, p. 12.

if the statutory basis for the exclusion order can also be found in a by-law.[13]

The third basis can be found in Article 172(a) *Gemeentewet*.[14] This provision has been in force since the introduction of the *Wet Maatregelen Bestrijding Voetbalvandalisme en Ernstige Overlast* (Dutch act on measures to combat football hooliganism and serious anti-social behaviour). On grounds of this provision the mayor can not only impose an exclusion order on an individual or a group in one or more parts of the city, but he can also order an exclusion order against an individual banning him or her from being in or near to one or more specific objects within the local authority. In order to use this power there must be question of repeated disturbance of public order. The exclusion order can be imposed for a maximum period of three months and can be extended for at the most three times, each time for a period of three months.[15]

Regardless of the grounds, the consequences of violating the exclusion order are the same. If an individual violates the exclusion order criminal proceedings can be initiated against him or her for violation of Article 184 of the *Wetboek van Strafrecht* (Dutch Criminal Code), for failure to comply with an official order.

2.1 Qualifying the exclusion order

The highest Dutch courts exclude the exclusion order from being regarded as a criminal charge. This is apparent from a case in which a drugs dealer appealed against an exclusion order. Criminal proceedings are also involved in the same case because the drugs dealer failed to comply with the exclusion order. In both proceedings the drugs dealer argues that the exclusion order is a criminal charge.

In the administrative proceedings the *Afdeling Bestuursrechtspraak van de Raad van State* (ABRvS, Administrative Jurisdiction Division of the Dutch Council of State) ruled that the exclusion order is not a criminal charge. The exclusion order is intended to prevent serious disturbance of the public order, such as openly possessing hard drugs or loitering with the intent to obtain hard drugs. For the qualification of the exclusion order the fact that criminal proceedings have been initiated for failing to comply with the ban is not relevant.[16]

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[13] See Hoge Raad 11 March 2008, ECLI:NL:HR:2008:BB4096, <www.rechtspraak.nl>; J.G. Brouwer & A.E. Schilder, 'Wijken voor orde: over nieuwe geboden en verboden', *Regelmaat* 2008, p. 91-93.

[14] See for example Rechtbank Leeuwarden 19 October 2012, ECLI:NL:RBLEE:2012:CA2962, <www.rechtspraak.nl>; Rechtbank Amsterdam 3 April 2012, ECLI:NL:RBAMS:2012:BW1140, <www.rechtspraak.nl>.

[15] See J.G. Brouwer & A.E. Schilder, 'De Voetbalwet. Ongekende mogelijkheden', *Tijdschrift voor Sport & Recht* 2009, nr. 3, p. 89-100.

[16] See ABRvS 4 May 2011, ECLI:RVS:2011:BQ3446, <www.rechtspraak.nl>; Rechtbank

In the criminal proceedings the Amsterdam Court of Appeal qualified the exclusion order as 'a measure of order that has become necessary due to the recurrent behaviour of the suspect'. The fact that the freedom of movement is restricted does not make this a criminal charge. Should the exclusion order indeed be considered a criminal charge, then, according to the court it would not be incompatible with the ECHR to charge a local authority with the prosecution and the punisment of specific violations, as long as the defendant has the opportunity to have the ruling pronounced against him heard by a court that provides the guarantees stipulated in Article 6 ECHR.[17]

In cassation the *Hoge Raad* (Dutch Supreme Court) does not address whether or not the exclusion order is contrary to the ECHR. According to the *Hoge Raad* this complaint cannot lead to cassation because it is directed 'against a superfluous consideration'.[18] The advisor of the *Hoge Raad* (the Attorney General) does address this question. According to the Attorney General it is not always certain whether an exclusion order is a preventive measure of order without a punitive character. The Attorney General, however, does not conclude that Article 6 ECHR has been violated because the suspect has the opportunity to have the exclusion order assessed by a court providing the guarantees stipulated in Article 6 ECHR. According to the Attorney General the administrative assessment of the exclusion order complies with Article 6 ECHR.[19]

3 Exclusion orders in Belgium

In 2005 the city council of Antwerp adopted a by-law authorising the mayor to impose an exclusion order in the event of recurrent anti-social behaviour. Whereupon a human rights organisation petitioned the *Afdeling Bestuursrechtspraak van de Raad van State* (Belgian Administrative Litigation Division of the Council of State) to declare the by-law null and void. The *Raad van State* (Belgian Council or State) ruled that the Antwerp exclusion order is a punitive sanction and declared the by-law to be null and void because the exclusion order is not included on the limitative list of sanctions in Article

Amsterdam 24 November 2011, ECLI:NL:RBAMS:2011:BU9162, <www.rechtspraak.nl>.

17 See Gerechtshof Amsterdam 2 January 2008, no. 23/002206-05 (not published).

18 See Hoge Raad, 22/12/2009, ECLI:NL:HR:2009:BK3254, <www.rechtspraak.nl>. See also Hoge Raad, 27 March 2007, ECLI: NL:HR:2007:AZ6007, <www.rechtspraak.nl>; HR 23 April 1996, Nederlandse Jurisprudentie 1996, 541, paragraph 7; Rechtbank Amsterdam, 28 February 2007, ECLI:NL:RBAMS:2007:BH4020, <www.rechtspraak.nl>.

19 See Advocaat-generaal, 22 December 2009, ECLI:NL:PHR:2009:BK3254, <www.rechtspraak.nl>paragraph 21-25; Advocaat-generaal 27 March 2007, ECLI:NL:PHR:2007:AZ6007, <www.rechtspraak.nl>, paragraph 23.

119bis of the *Nieuwe Gemeentewet* (new Belgian local government act).[20]

In 2014 the Belgian federal legislator introduced a new statutory basis for the exclusion order. The *Wet betreffende de Gemeentelijke Administratieve Sancties* (Local Government Administrative Sanctions Act) inserts Article 134sexies into the *Nieuwe Gemeentewet*. The mayor can impose an exclusion order in the event of a disturbance of public order caused by individual or collective behaviour. He can also impose an exclusion order in the event of recurrent violation of a by-law 'at the same place or at similar events' that involve a disturbance of public order or anti-social behaviour. The exclusion order is valid for a maximum period of one month and can be renewed twice. Failure to comply with the exclusion order is punishable by a maximum local government administrative sanction of € 350.[21]

3.1 Qualifying the exclusion order

Belgian administrative law distinguishes between administrative measures and administrative sanctions. The imposition of administrative measures does not require a violation to have taken place, but simply that there is a 'potential danger' to public order and peace. An administrative sanction is a response 'to what is considered to be a violation'.[22]

In 2009 the *Raad van State* qualified the Antwerp exclusion order as an administrative sanction and a criminal charge. The mayor can indeed only impose the exclusion order in the event of an offence. In addition, from the local authority's website it emerged that the exclusion order has a punitive character. The exclusion order is embedded in a context of sanctioning, punitive measures that the local government uses to tackle anti-social behaviour as an alternative to criminal prosecution. Finally, the duration of the exclusion order is linked directly to the compliance shown by the offender in the past. That the duration of the sanction depends on the offender's behaviour is characteristic for a punitive measure. The exclusion order does not centre upon the ability to solve the problem but rather on punishment.[23]

In 2014 the federal legislator endeavoured to bypass the guarantees in Articles 6 and 7 ECHR by introducing Article 134sexies *Nieuwe Gemeentewet*.

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[20] Administrative Litigation Division of the Belgian Council of State 23 October 2009, no. 197.212, <www.raadvst-consetat.be/>.

[21] See W. Vandenbruwaene, 'Loopt Joëlle Milquet niet te hard van stapel?', *De Morgen* 4 April 2012, p. 1-2; Vols 2013, p. 174-175. Administrative Litigation Division of the Belgian Council of State 23 October 2009, no. 197.212, <www.raadvst-consetat.be/>.

[22] See Administrative Litigation Division of the Belgian Council of State 23 October 2009, no. 197.212, <www.raadvst-consetat.be/>.

[23] See Administrative Litigation Division of the Belgian Council of State 23 October 2009, no. 197.212, <www.raadvst-consetat.be/>. See also S. Brabants, 'Het straatverbod in de Stad Antwerpen: (g)een doodlopende straat?', *Tijdschrift voor gemeenterecht* 2010 (2), p. 139 - 142

The exclusion order is explicitly referred to as an administrative measure and not as a criminal charge. The legislator proposed that the exclusion order is used to tackle order disturbances and is thus not accompanied by any decision at all regarding the grounding of a charge in criminal law.[24]

Whether this argument can be upheld is doubtful. Indeed, in 2013 the *Afdeling Wetgeving van de Raad van State* (the Legislation Division of the Belgian Council of State) referred to the new exclusion order as a criminal charge. The *Raad van State* concluded that an exclusion order is a response to the violation of by-laws and still has a punitive character. The preventive aspect of the exclusion order is, according to the *Raad van State*, insufficiently reflected in the act.[25]

4 Exclusion orders in England and Wales

An exclusion order can be imposed in both England and Wales since 1998 by way of an 'Anti-social Behaviour Order' (ASBO). An ASBO is imposed on an individual engaged in anti-social behaviour under the Crime and Disorder Act 1998 and contains a ban on the behaviour described in the order for a period of at least two years. The district court imposes an ASBO at the request of a local authority or the police and applies a 'two-stage test'. Firstly, the court assesses whether the suspect has behaved in such a way as to cause 'harassment', 'alarm' or 'distress' or is likely to do so, to one or several people outside his or her household. Secondly, the court assesses whether the ASBO is necessary to protect these people against the anti-social behaviour. The Crown Prosecution Service can initiate criminal proceedings in respect of individuals who fail to comply with the ASBO. An offender can be punished by a monetary fine and/or a prison sentence of up to five years.

In 2013 the 'Anti-social Behaviour, Crime and Policing Bill' was put before parliament. This bill aimed to replace the ASBO with the 'Injunction to Prevent Nuisance and Annoyance' (IPNA). Just as the ASBO, the IPNA is imposed by the court at the request of the local authority. The court will uphold the request if there is evidence of 'conduct capable of causing nuisance or annoyance to any person'. This broad criterion was, however, rejected by the House of Lords in January 2014. What the new criterion will be is as yet unclear.[26]

Failure to comply with an IPNA is, like the ASBO, not a criminal offence. Just as with the ASBO non-compliance is considered to be 'civil contempt of court'. Civil contempt of court is punishable by a prison sentence of up to two years or a monetary fine. However, a sentence does not lead to a criminal record.[27]

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[24] Vols 2013, p. 174.

[25] See Belgische Kamer van volksvertegenwoordigers 2012-2013, nr. 2712/001, p. 63.

[26] See 'Peers block law on being annoying in public', *BBC news* 9 January 2014.

[27] S. Hodgkinson & N. Tilley, 'Tackling anti-social behaviour: Lessons from New Labour

4.1 Qualifying the exclusion order

To bypass the strict evidence rules under criminal law the English legislator has opted for private law as grounds for imposing the ASBO and the IPNA. Advantage is taken of the flexibility of civil law procedures and the strength of the criminal law.[28] Thus for example hearsay evidence is permitted in the taking of evidence for the imposition of the ASBO.[29]

In 2002 the House of Lords decided that an ASBO should not be regarded as criminal charge. This highest court based its statement on four arguments: 'no breach of the criminal law need be proved, no criminal conviction results, the Crown Prosecution Service are not involved, and the purpose of the order is preventive'.[30] Nonetheless the House of Lords determined that in the first phase of the two-stage test the more stringent criminal evidence standards apply. It should be beyond reasonable doubt that the suspect has acted anti-socially. In the second phase of the two-stage test the court has more freedom.[31] Lawyers have continued to criticise the ASBO since this ruling and are hoping the European Court will halt the government.[32]

The chance that the European Court will rule on the ASBO has become small since this is likely to be replaced with the IPNA. However, the critisism continues. When imposing an IPNA use is also made of private law and less stringent criteria are used than in the past. Although the government is of the opinion that there are sufficient procedural safeguards in the imposition of an IPNA, this is questioned in literature.[33]

5 Evaluation of the exclusion orders

In the Netherlands, England, Wales and Belgium local government bypasses the requirements set out in Articles 6 and 7 ECHR when imposing an exclusion order. In each of the three countries reference is made to the preventive character of the exclusion order: the sanction intends to restore public order and is not punitive by nature. The purpose of the exclusion order is to restore public order and to prevent new anti-social behaviour.

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for the Coalition Government', *Criminology and Criminal Justice* 2011 (4), p. 301.

28 Home Office, Respect and Responsibility. Taking a Stand Against Anti-Social Behaviour, London: Home Office 2003, p. 3.

29 See S. Macdonald, 'The Nature of the Anti-Social Behaviour Order -R (McCann & Others) v Crown Court at Manchester', *The Modern Law Review* 2003 (4), p. 630-639.

30 Ashworth 2004, p. 276.

31 Ashworth 2004, p. 276-277.

32 See N. Padfield, 'The Anti-social behaviour Act 2003: the Ultimate Nanny-state Act', *Criminal Law Review* 2004, p. 713; Bakalis 2007, p. 438; Macdonald 2003, p. 637-638.

33 See K.J. Brown, 'Replacing the ASBO with the injunction to prevention nuisance and annoyance: a plea for legislative scrutiny and amendment', *Criminal law review* 2013 (8), p. 623-639.

It is doubtful whether the European Court will agree to the decriminalisation of the exclusion order. It is not a generally accepted fact that an exclusion order is not a criminal charge. The highest national courts are divided on this issue. On the one hand the highest courts in the Netherlands, England and Wales qualify the exclusion order as a preventive administrative measure. While in Belgium on the other hand the *Raad van State* considers the exclusion order to be a criminal charge.

The European Court will judge the exclusion order based on the aforementioned criteria.[34] The qualification of the exclusion order under national law will probably not have a significant role to play in this. It all comes down to the nature of the offence and the nature and the severity of the sanction. We do not expect the European Court to regard an exclusion order as a criminal charge, as long as it has a short duration and the preventive character is emphasised by the government. If the exclusion order is given a more punitive and deterrent character directed towards the individual circumstances of the offender (as was the case in Belgium), then it is more likely to be qualified as a criminal charge.[35] It is thus important that short term exclusion orders are imposed and to choose the arguments for imposing an exclusion order with care.

If the European Court follows the Belgian *Raad van State* and comes to the conclusion that an exclusion order is a criminal charge, the consequences need not necessarily be too great. It is not by definition contrary to Article 6 ECHR if the local government takes punitive action against 'minor offences'. It is however required that 'the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6'.[36] The specific requirements the European Court lays down for this legal protection differ per sanction: not all the criminal charge guarantees in Article 6 ECHR apply to minor administrative penalties.[37]

Defenders of the rights of homeless people should therefore not be satisfied with the formal-legal argument that there is a criminal charge: 'In this sphere, then, European human rights law may not have a great deal to offer'.[38] It might be wiser to strive for a balance between, on the one hand, the effective maintenance of law and order and, on the other hand, the observance of the rights of the homeless.

Indeed the advantages of an exclusion order should not be denied. Firstly, the exclusion order offers local government the opportunity to tackle anti-

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34 See ECHR 21 February 1984, nr. 14949/03 (Öztürk v. Germany), paragraph 50.

35 Cf. H. Hennekens, 'De bevelsbevoegdheid van de burgemeester tegen het licht van art. 6 Europees Verdrag voor de rechten van de Mens', *De Gemeentestem* 1996, 7030; Brouwer & Schilder 2007, p. 15-16.

36 See ECHR 21 February 1984, nr. 14949/03 (Öztürk v. Germany), paragraph 56.

37 See Van Emmerik & Barkhuysen 2009, p. 110.

38 Ahsworth & Zedner 2008, p. 45.

social behaviour without being fully dependent on the cooperation of the Public Prosecutor. In the past the Public Prosecutor gave no priority to relatively innocent but anti-social offences, as a result of which victims of anti-social behaviour could not be given effective assistance. With the help of an exclusion order priority can be given now at local level to tackling anti-social behaviour.[39]

Secondly, homeless people behaving anti-socially also benefit from the use of exclusion orders. There is no criminal record, because it is not regarded as a criminal charge. A homeless person will not be disadvantaged as a result of the exclusion order when seeking work or housing, which is the case if there is a criminal charge.[40] It should be observed that a criminal charge for violating the exclusion order does usually result in a criminal record.[41]

However, the disadvantages of the exclusion order suggest that on balance it is unfavourable for homeless people. To start with there is 'net-widening' and 'mesh-thinning': local government acts faster and more forcibly than in the past because there are fewer procedural safeguards.[42] Where violation of the ban on begging usually tended to result in the case being dismissed by the Public Prosecutor, now the local government imposes an exclusion order. For some critics this more active action against anti-social behaviour is the harbinger of the repressive security state[43] or the ultimate nanny state.[44]

Secondly, homeless people have less legal protection. For example less stringent evidentiary rules apply and less compelling evidence suffices than is the case in a criminal prosecution.[45] The ban on retroactivity is not in full force.[46] In addition, the review of the exclusion order by the administrative or civil courts is less intensive than the review by a criminal court.[47]

Thirdly, the criteria on the basis of which an exclusion order is imposed are less precise than are criminal law provisions. Vague concepts such as 'public order', 'anti-social behaviour', 'harassment', 'alarm', 'distress', 'nuisance' and 'annoyance' are used. This is not fully in line with the principle of legal

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39 See Hennekens 1996; Beckett & Herbert 2009, p. 21.

40 See Ahsworth 2004, p. 273; Parliamentary documents *Kamerstukken II* 2013-2014, 33 797, nr. 3 (Explanatory memorandum).

41 See Hodgkinson & Tilley 2011, p. 301.

42 S. Cohen, *Visions of Social Control: Crime, Punishment and Classification*, Cambridge: Polity Press 1985; Beckett & Herbert 2009, p. 11.

43 P. de Hert & K. Meerschaut, 'Letrres persanes 10, De Belgische morele openbare orde beschermd. Vroeger was het vrijer', *Nederlands Tijdschrift voor Rechtsfilosofie En Rechtstheorie* 2007 (3), p. 95-103.

44 See Padfield 2004.

45 See Ahsworth & Zedner 2008, p. 30 & 36.

46 See for example Rechtbank Amsterdam 3 April 2012, ECLI:NL:RBAMS:2012:BW1140, <www.rechtspraak.nl> paragraph 4.4. See also Ahsworth 2004, p. 279-283; Ahsworth & Zedner 2008, p. 36.

47 See Bakalis 2007, p. 438-439.

certainty.[48] This objection, however, can be somewhat alleviated by issuing a warning before imposing an exclusion order. In this way homeless people know what behaviour will result in an exclusion order.[49]

Fourthly, using the exclusion order the resultant sanctions are upgraded creating the risk of disproportionality. Thus under Dutch law there is an offence if a homeless person violates a ban on begging in a local by-law. In this case, pre-trial detention is not possible. If however an exclusion order is imposed on the homeless person following a violation of the ban on begging and should this person violate this order, this is a criminal offence. Pre-trial detention is now allowable.[50] In England the sanction for non-compliance with an ASBO or IPNA is generally much higher than the sanction for the act that led to the imposition of the exclusion order.[51] In Belgium there is no question of upgrading: the violation of a by-law and the violation of an exclusion order are punished by an administrative monetary fine of up to € 350.[52]

Finally, when weighing the pros and cons the question of whether or not the exclusion order is a real solution should be addressed. Of course the anti-social behaviour will disappear from the specific area and the residents will have a temporary respite but the anti-social behaviour is likely to go elsewhere.[53] Repressive social exclusion will not solve the underlying causes such as addiction, unemployment and psychological problems. It is therefore a good idea to combine a short exclusion order with more solution-oriented legal measures, such as 'problem-solving courts' and 'Housing first' projects, which aim to reduce anti-social behaviour in the long run.[54]

6 Conclusion

The exclusion order is qualified differently in the Netherlands, Belgium and the United Kingdom. In both the Netherlands and Belgium the exclusion order is an administrative measure. In England and Wales it is a civil measure. The decriminalisation of the exclusion order makes it possible for local government to tackle anti-social behaviour without this resulting directly in a criminal record for the offender. On the other hand the offenders have less legal protection. We believe that the exclusion order need not be

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48 See Ahsworth & Zedner 2008, p. 31l; Brouwer & Schilder 2008, p. 99.

49 See ECHR 4 June 2002 Landvreugd v. the Netherlands 37331/97, paragraphs 62-64.

50 See Brouwer & Schilder 2007, p. 14.

51 See Ahsworth & Zedner 2008, p. 30-31.

52 See Vols 2013, p. 174-175.

53 See Moore 2008, p. 183-184.

54 See Beckett & Herbert 2009, p. 17-22 & 149-156; G. Berman & J. Feinblatt, Good courts. The case for problem-solving justice, New York: New Press 2005, D. B. Wexler, Rehabilitating lawyers. Principles of therapeutic jurisprudence for criminal law practice, Durham:Carolina Academic Press 2008.

regarded as a criminal charge if the order is imposed for a short duration and is aimed at restoring public order and preventing anti-social behaviour. The exclusion order is a necessary means for maintaining public order as long as the rights of the offenders and the tackling of the underlying causes are not ignored.

Chapter 6
Down and under: criminal law enforcement and treatment programmes in Australia

Andrew Fletcher

1 Introduction

Homelessness has typically been dealt with in a distinctive way in Australia: by treating it as a symptom of other social problems, such as a lack of affordable housing, unemployment, domestic violence and the breakdown of familial relationships.[1] This approach has two related consequences. The first is that Australian governments seek to formulate policies which address these root causes of homelessness, helping to prevent people from becoming homeless in the first place but tending not to take account of those already suffering from homelessness. The second is that, because of this focus, the main contact between homeless people and the state is not through social security personnel, but through law enforcement officials tasked with managing public spaces. This means that the relationship between homelessness and criminal law is an important, yet neglected, area of inquiry in Australia. Given that the 2011 census of Australia showed that the rate of homelessness rose across the country by 8% since 2006 it is more important than ever to address these issues.[2]

The structure of this chapter is based on the idea that both a legal analysis of the potential interactions between homeless people and criminal law and an account of the empirical realities of these interactions is necessary to provide an accurate picture of the experiences of homeless people. As such, the chapter will begin with a brief history of legislation dealing with homelessness to provide context for the contemporary legal framework in New South Wales. That framework will then be examined, and its implications for the exposure of homeless people to the criminal justice system will be explored. The framework's implementation in the practice of law enforcement will then be examined to determine the extent to which

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1 New South Wales Department of Family and Community Services, *NSW Homelessness Action Plan*, 2009 at <www.housing.nsw.gov.au/NR/rdonlyres/070B5937-55E1-4948-A98F-ABB9774EB420/0/NSWHomelessnessActionPlan.pdf > last accessed on 16 May 2013.

2 Australian Bureau of Statistics, 2049.0 Media Release - Census of Population and Housing: Estimating homelessness, 2011 at <www.abs.gov.au/ausstats/abs@.nsf/latestProducts/2049.0Media%20Release12011 > last accessed on 8 May 2013.

homeless people are in fact disproportionately exposed to criminal justice. Finally, efforts undertaken by the NSW Government will be evaluated to determine how effectively they address any identified issues concerning homelessness and criminal justice.

Although Australia-wide data and trends may be examined, the chapter will focus on the author's home State of New South Wales. This is because most criminal law in Australia, including those provisions most relevant to the experience of homeless people, is the responsibility of state governments and courts, so there are often significant variations between states.

While a great deal of literature on the subject of homelessness and the law was written in the early 2000s there has been a recent paucity of scholarly interest in the subject outside of governmental research and statistics bodies and NGOs. A number of these works will be relied on, but in order to compensate for their potential obsolescence, the chapter will also place an emphasis on evaluating some of the most recent efforts to address the problems of homelessness and the criminal law, including through comparisons to measures taken in other states.

2 The history of homelessness and criminal laws in NSW

Appreciation of the current legal framework may be improved by a short explanation of the history of the laws relating to homelessness in NSW. In the early 20th Century the NSW Government passed the *Vagrancy Act*.[3] This Act approached homelessness from a heavily moralistic and individualistic perspective, illustrated by the fact that the offences of 'having no visible lawful means of support'[4] and '[begging] or gathering alms'[5] were lumped together in the same section as offences such as 'being a common prostitute [wandering] in any street or public highway',[6] 'being a habitual drunkard'[7] and '[being] found in a house frequented by reputed thieves'.[8] The logic of the Act suggested that homelessness was not only a deliberate choice of conduct, but a criminally culpable one. This attitude appears to have been sourced from the *Vagrancy Act 1824*, a United Kingdom statute which was implemented on the assumption that the plight of the homeless was caused by idleness and was therefore deliberate.[9]

Vagrancy legislation continued to exist in this form for the greater part of the 20th Century. However, in 1976 a seminal report by Professor Ronald

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3 Vagrancy Act 1902 (NSW).
4 *Vagrancy Act 1902* (NSW), s 4(1)(a).
5 *Ibid*, s 4(1)(g).
6 *Ibid*, s 4(1)(c).
7 *Ibid*, s 4(1)(d).
8 *Ibid*, s 4(1)(f).
9 *Vagrancy Act 1824* (UK), Introductory Text.

Sackville to the Commission of Inquiry into Poverty, Homeless People and the Law impressed upon the Federal Government that the laws on vagrancy and public drunkenness discriminated against people from low socio-economic backgrounds - especially the homeless, and, in fact, had the effect of reinforcing the behaviours they sought to deter.[10] In the following years this led to an agreement between the Federal and the State governments to provide minimum entitlements for those at risk of homelessness and eventually to the repeal of State vagrancy laws.[11]

It must also be noted that Australia's homelessness problem is part of its legacy of colonisation and the associated dispossession of Aboriginal Australians. Almost since the First Fleet landed in Port Jackson in 1788, Aboriginals, where they were not massacred by European diseases or the colonists themselves, have been subject to entrenched social and economic disadvantage. Indeed, vagrancy legislation in NSW originally assumed that Aboriginals were vagrants *ipso facto* and made association with them by white Australians a punishable offence.[12] Today, despite the fact that Australian laws no longer expressly discriminate against them, Aboriginal Australians account for approximately 25% of Australia's homeless population[13] even though they account for only 3% of its overall population[14] - this is a staggering discrepancy.

This account of the historical development of homelessness laws in Australia, though brief, shows an important development: the traditional British conception of the criminally liable 'undeserving poor' as enshrined in the *Vagrancy Act 1824* thankfully appears to have been significantly undermined in the second half of the 20th Century. However, although vagrancy itself is no longer an offence in NSW, a Law and Justice Foundation survey at the turn of the new century found that homeless respondents were almost twice as likely to have encountered problems with the criminal law as those who were

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[10] R. Sackville, *Commission of Inquiry into Poverty, Homeless People and the Law*, Report for the Law and Poverty series, Canberra: AGPS 1976, p. 38.

[11] E. McCarron, L. Shetzer & S. Forell, *No Home, no Justice? The Legal Needs of Homeless People in NSW,* Law and Justice Foundation New South Wales: Research Publications 2005, p. 11.

[12] Vagrancy Act 1902 (NSW), s 4(1)(b).

[13] Australian Bureau of Statistics, 2049.0 Media Release - Census of Population and Housing: Estimating homelessness, 2011 at <www.abs.gov.au/ausstats/abs@.nsf/latestProducts/2049.0Media%20Release12011 > last accessed on 08 May 2013.

[14] Australian Bureau of Statistics, 3101.0 - Australian Demographic Statistics, 2012 at <www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/3101.0Feature%20Article1Mar%202012?opendocument&tabname=Summary&prodno=3101.0&issue=Mar%202012&num=&view> last accessed on 08 May 2013.

not homeless.15 These encounters occur primarily under the framework of the *Summary Offences Act 1988* (NSW).

3 The current legal framework

The laws which are currently most commonly applied to homeless people can be summarised quite briefly. Under the *Summary Offences Act 1998* (NSW), 'obstructing traffic' is an offence defined as wilfully preventing the free passage of persons or vehicles in public places. It places the onus of proof for providing a reasonable excuse on the accused person, and the maximum fine is $440.[16] Other potentially relevant criminalised activities include offensive conduct and language[17] and custody of an offensive implement (e.g. a knife).[18] Although public drunkenness is no longer an offence *per se* in NSW, a person who is found to be intoxicated in a public place can be detained temporarily for his/her own protection or the protection of others until he/she can be released into the care of a responsible person.[19]

Under s 197 of the *Law Enforcement (Powers and Responsibilities) Act2002* ('LEPRA') a police officer may in certain circumstances give a person a direction to leave a public place and not return for a specified period not exceeding 6 hours. Such a direction may be given if the officer reasonably believes, *inter alia*, that the person is obstructing another person or traffic,[20] is harassing or intimidating other persons,[21] or is causing or likely to cause fear to a person of reasonable firmness.[22] The Act was amended in 2011 by the *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* to allow police to give the direction on the basis that the person is intoxicated. Failure to comply may result in a fine of up to $660.[23]

Furthermore, the *Crimes Amendment (Consorting and Organised Crime) Act 2012* creates an offence of 'habitually consorting' with at least two convicted offenders on at least two different occasions after having been warned by police that doing so is not acceptable.[24] The legislation was intended to allow police to combat organised crime but it could also be used to target

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15 J. Mullins, L. Buonamano & L. Schetzer, *Access to Justice and Legal Needs*, Law and Justice Foundation of New South Wales Research Publications 2002, p. 23.
16 Summary Offences Act 1988 (NSW), s 6.
17 *Ibid*, s 4 and s 4A respectively.
18 *Ibid*, s 11B.
19 Law Enforcement (Powers and Responsibilities) Act2002 (NSW), s 206(1), s 206(4).
20 *Ibid*, s 197(1)(a).
21 *Ibid*, s 197(1)(b).
22 *Ibid*, s 197(1)(c).
23 *Ibid*, s 9(1).
24 Crimes Act 1900 (NSW), s 93T.

public gatherings of homeless people if two or more of them have a criminal record.

Although this outline paints an imposing picture of the potential experience of homeless people and the law, a depiction of the NSW legal framework in this way presents a 'worst-case-scenario' outlook, as the day-to-day exposure of homeless people to criminal justice is determined almost entirely by the discretion of law enforcement officers in applying the law.

4 The role of law enforcement

Interviews conducted with homeless people by the Law and Justice Foundation indicate that homeless people were often asked to 'move on' by police officers in the manner allowed by s 197 of LEPRA and that it was necessary to move frequently in order to the police.[25] It was also reported in the same interviews that these move-on directions may often progress to drug searches. Interestingly, although homeless people may also theoretically be susceptible to being told to move on by council rangers, there is evidence to show that very few homeless people encounter enforcement action by local councils - enforcement is instead overwhelmingly conducted by police officers.[26]

A Law and Justice Foundation survey found that homeless people were more susceptible to receiving fines due to their high public visibility, especially for drinking and public transport infractions.[27] The fines themselves put financial pressure on already vulnerable individuals, but can be further compounded by the interest that accrues on the principal sum, either due to an inability to pay the original fine or the lack of a regular address at which to receive postal notice of the fine.

Furthermore, difficulties in paying fines can snowball into more coercive methods of criminal enforcement. If a fine remains unpaid it can be referred to the State Debt Recovery Office (SDRO), which has the power to issue a fine enforcement order. Under this order, the debtor has 28 days to pay the fine, after which the SDRO may take various forms of enforcement action, including having the debtor's drivers' licence cancelled.[28] The ability to drive may be vital to those seeking employment in regional areas of Australia, including those who are homeless and those who are in danger of becoming homeless, and if such persons continue to use their cars after having their

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[25] McCarron, Shetzer & Forell 2005, p.109.
[26] *Ibid*, p. 109.
[27] *Ibid*, p. 105-106.
[28] *Ibid*, p. 107.

licences cancelled they will be at risk of going to gaol. In this way the NSW legal framework may cause homeless people to face some of the most coercive criminal sanctions available due to summary infringements that they may honestly and justifiably lack the means to address in a timely fashion.

The recent increases of police powers by amendments to the *Summary Offences Act 1988* and the *Law Enforcement (Powers and Responsibilities) Act 2002* may show, particularly through subsequent police practice, that the exposure of homeless people to law enforcement, and therefore to the criminal legal system, may have more to do with geographical location than any other factor. Statistics from the Homeless Persons' Legal Service showed that, in the wake of these amendments, there was no significant impact on HPLS clients in the inner Sydney area, but that there had been significantly greater police activity, including use of the new powers, against homeless people in the outer Sydney suburb of Parramatta.[29]

The effects of another recent government initiative provide an explanation, and a potential explanation, of this phenomenon. In 2012 the NSW Department of Family & Community Services released a new 'Protocol for Homeless People in Public Places,' originally implemented in 2000, which aims to make sure that homeless persons in public places are treated 'respectfully and appropriately' and in a non-discriminatory manner, especially by the police.[30] The Protocol is intended to serve as a set of best-practice guidelines,[31] but there is evidence that in most areas of New South Wales the Protocol may be more honoured in the breach than in the observance. StreetCare, a private homeless consumer advisory committee, has observed that police officers in the inner Sydney area generally show skill in appropriately interacting with homeless people and appear to have embraced the Protocol, but among police in the Parramatta suburb of Sydney knowledge of the Protocol was 'haphazard at best' and that in the Hunter Valley region to the north of Sydney knowledge of the Protocol was almost non-existent.[32]

It may be that a lack of knowledge of the Protocol among Police Local Area Commands (LACs) outside of the inner Sydney area has led to a more heavy-handed application of the new laws to homeless persons regardless of their

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29 L. Schetzer, *Submission in Response to Ombudsman NSW Issues Paper: Summary Offences Act 1988*, Public Interest Advocacy Centre Research Publications, February 2013a, p. 7.

30 NSW Department of Family & Community Services, *Protocol for Homeless People in Public Places*, May 2013 at <www.housing.nsw.gov.au/NR/rdonlyres/E77B6F48-E68A-4FE0-8CDB-30813F3F28D5/0/ProtocolforHomelessPeople.PDF> last accessed on 13 May 2013.

31 Schetzer 2013a, p. 6.

32 *Ibid*, p. 8.

particular vulnerabilities. It is likely that this lack of knowledge is attributable to a lack of resources or opportunity for training in these LACs. This example demonstrates that what is allowed by the legal framework of law enforcement matters much less to the experiences of homeless people than the extent to which enforcement powers are in fact used by individual police officers, which may vary according to geography and resource availability.

5 Government solutions

It is clear that the NSW criminal legal framework contains a number of measures which may be applied in a way which exacerbates the problems faced by homeless people, and that a measure of sensitivity on the part of law enforcement officials is needed to moderate the enforcement of the law. Aside from developing the Protocol for Homeless People in Public Places, however, the NSW Government has not devoted many of its resources to changing law enforcement practices: instead, it has provided programmes which offer treatment for some of the root causes of homelessness, such as drug addiction and mental illness. There are compelling reasons for adopting this kind of approach. The Public Interest Advocacy Centre runs a Homeless Persons' Legal Service (HPLS) which provides free legal assistance, in particular in relation to minor criminal matters, to those who are homeless or at risk of becoming homeless and it collected statistics on the 362 clients it represented between 2010 and 2012. Of these, 48% disclosed that they had a mental illness, 63% disclosed that they had a drug or alcohol dependency, and 41% disclosed that they had both.[33] It is clear that any programmes designed to reduce homelessness would do well to integrate treatment for these problems, and a number of recently-established government programmes attempt to do so.

As part of its goal to reduce rates of re-offending by 5% by 2016,[34] the NSW Government established a scheme called 'Court Referral of Eligible Defendants into Treatment' (CREDIT). This scheme is designed with the goal of reducing re-offending by linking defendants in local courts with treatment and rehabilitation programmes.[35] A two-year pilot programme was run from 2010 to 2012 in the local government areas of Burwood (a relatively

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33 L. Schetzer, Value of a justice reinvestment approach to criminal justice in Australia: A submission to the Senate Legal and Constitutional Affairs References Committee, Public Interest Advocacy Centre Research Publications, March 2013b, p. 1-2.

34 NSW Government, *NSW 2021: A Plan to Make NSW Number One*, September 2011 at <www.2021.nsw.gov.au/sites/default/files/NSW2021_WEB%20VERSION.pdf > last accessed on 14 May 2013, p. 35.

35 L. Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: An evaluation*, NSW Bureau of Crime Statistics and Research: Crime and Justice Bulletin, No, 159, February 2012, p. 4.

densely-populated and low-income suburb of Sydney) and Tamworth (a regional town in NSW). It includes among its grounds of eligibility that the offender has an identifiable problem related to his/her offending behaviour such as substance abuse or other addictions, mental health problems, poor employment prospects and unstable housing.[36]

The effectiveness of this programme can be evaluated by comparing it to initiatives in other states. The State of Queensland set up a pilot program for a Homeless Person's Court in 2006 into which homeless people who have been charged with relatively minor public order offences could be referred.[37] The consensus was that it handed down sentences which more effectively took into account the particular circumstances faced by homelessness people, as evidenced by the fact that fines and imprisonment sentences were less common and referrals to treatment programmes were more common than in the general common law courts.[38] Although this approach has been criticised for being 'soft' on offenders, it was only used as a response to the most minor offences.

This Queensland initiative provides a useful comparison to the NSW CREDIT programme because it exposes two shortcomings in CREDIT's ability to directly address the underlying mental health problems and drug addictions which are in many cases the root causes of homelessness. The first is that CREDIT's ambit is broader, including not just homeless persons but also, *inter alia*, those offenders who have drug addictions or mental health problems but who also have stable housing. This is problematic for primary homeless people who have lived on the streets for some time, as the assessment for eligibility to participate in CREDIT takes into account, among other factors, the degree to which the identified problems can be treated and the capacity of the offender to participate in treatment,[39] which means that those with less severe problems may be treated preferentially.

The second shortcoming is that, while the Queensland Homeless Persons' Court uses referral to treatment or rehabilitation as one possible outcome of the sentencing process, the CREDIT programme is undertaken in the context of an adjournment of regular court proceedings,[40] and even if it is completed satisfactorily by a defendant, the defendant still proceeds to a

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36 *Ibid.*

37 C. Mason, E. Marchetti, F. Guthrie & S. Watters, *Homeless Persons Court diversion program pilot evaluation*, Creative Sparks Research Papers, November 2007 at <www.communities.qld.gov.au/resources/housing/community-programmes/homeless-persons-court-evaluation.pdf > last accessed on 13 May 2013, p. 7.

38 Schetzer 2013b, p. 7.

39 Trimboli 2012, p. 4.

40 *Ibid*, p. 5.

normal sentencing hearing at the end of the programme which may result in punishment notwithstanding any positive outcomes achieved during the programme. Furthermore, while the Homeless Persons Court offers a solution which defers any determination of criminality until the end of proceedings, it is an implied condition precedent to participation in the CREDIT programme that the defendant engaged in criminal conduct (the third eligibility criterion is that 'the defendant must be motivated to address the problems related to *his/her offending behaviour*' [emphasis added]), which reduces the plausibility of a 'not guilty' plea which the defendant might well wish to enter. Having said this, court stakeholders have reported that positive progress in the CREDIT programme typically resulted in substantially lower penalties.[41] The effectiveness of the CREDIT programme should not be underemphasised; an overwhelming 95.9% of participants in the programme reported that it had changed their lives for the better,[42] and the NSW Bureau of Crime Statistics and Research has recommended that it be implemented across the State as a whole.[43] However, while the programme had little trouble referring defendants to mental health and alcohol treatment services, it had great difficulty finding appropriate accommodation for those who were in need of it (only 20.5% of those interviewed for accommodation services were able to be successfully referred).[44]

Other recent initiatives have not been so well regarded in the manner that they have treated homeless people. There is a NSW Drug Court which has been regarded favourably by the NSW Bureau of Crime Statistics and Research for lowering rates of recidivism by redirecting drug-dependent offenders into treatment instead of into prison, but the eligibility requirements for referral to the Court include fixed accommodation, meaning that primary homeless persons are effectively excluded from participation.[45] By contrast, Way2Home is an 'Assertive Outreach Service' which was established in 2010 and funded by the City of Sydney and Housing NSW which implements a 'housing first' approach; this is based on the philosophy that homeless people should be provided accommodation which is not contingent on sobriety or compliance with treatment.[46] Among the programmes offered by the NSW Government, Way2Home seems to be *sui generis*.

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41 *Ibid*, p. 18.

42 *Ibid*.

43 Schetzer 2013, p. 13.

44 *Ibid*, p. 15.

45 *Ibid*, p. 14.

46 Way2Home Assertive Outreach Service, *City of Sydney Community Support: Homelessness*, May 2013 at <www.cityofsydney.nsw.gov.au/community/community-support/homelessness/way2home > last accessed on 16 May 2013.

6 Conclusion

It is clear that homelessness is a state of affairs which both causes affected persons to have a greater than normal exposure to the criminal justice system while also impairing their ability to effectively negotiate that system. By examining first the legal framework, then police practice in enforcing that framework and efforts by the NSW Government to address problems with it, this chapter has attempted to canvas all potential avenues of interaction between homeless persons and the criminal justice system. In doing so, it has become clear to the author that a significant lacuna exists in the government's efforts to address the particular vulnerabilities of homeless people, and that is at the stage of police practice.

Two conspicuous patterns emerge from the selection of NSW Government programmes examined in this chapter. The first is that they are concerned only with those homeless people who have actually been charged with offences - while this kind of support is invaluable and welcome, it does not address the lion's share of the interactions which homeless people have with police; in particular, with police 'move on' powers under LEPRA and the *Summary Offences Act*. The second pattern is that these programmes do not target the problem of homelessness *per se*, but instead other problems such as mental illness, drug dependency or alcoholism. This is consistent with the 'preventative' approach taken by most Australian governments to the problem of homelessness; i.e. that the most effective way to reduce rates of homelessness is to treat what are perceived to be its root causes,[47] but this premise may be cold comfort to those who are already experiencing primary homelessness.

The CREDIT programme has been highly effective in achieving its stated goal of helping offenders reintegrate into society and reducing rates of re-offending but, while many homeless persons have benefited from it, the benefit of homeless persons *as such* is not the goal of the programme. While the expansion of the programme would be welcome, an even better solution for homeless people would be one along the lines of Queensland's Homeless Persons Court. The expansion of a programme such as Way2Home would be another effective solution; by providing immediate accommodation for primary homeless people the government would ensure that they would no longer be subject to potentially capricious law enforcement in public spaces and grant them the foundations for a more effective recovery from potential mental illness and substance abuse issues. However, it would of course

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47 NSW Department of Family and Community Services, *NSW Homelessness Action Plan*, 2009 at <www.housing.nsw.gov.au/NR/rdonlyres/070B5937-55E1-4948-A98F-ABB9774EB420/0/NSWHomelessnessActionPlan.pdf> last accessed on 16 May 2013.

be impractical and prohibitively expensive to provide this service for every homeless person. In the final analysis, the best way for the NSW Government to reduce the disproportionate exposure of homeless people as a whole to the criminal justice system would be to place a stronger emphasis on promoting a culture of understanding among suburban and regional police forces of the invidious situation in which primary homeless people find themselves. The Protocol for Homeless People in Public Places demonstrates recognition by the NSW Government of the real problems faced by homeless people on a day-to-day basis but this recognition still needs to be passed on to law enforcement agencies across the whole of NSW. This is an unattractive solution from a policy-maker's perspective because the success of this kind of cultural change is difficult to quantify, but it appears to be the solution which is most relevant to the daily experiences of homeless people.

Chapter 7
Is begging a crime? A case from the Netherlands

Koen Bandsma

1 Introduction

In 2000 the Dutch government abolished the nationwide prohibition of begging, claiming that there was no longer any need for such a ban.[1]

Despite the decriminalization of begging nationally, many local authorities in the Netherlands have introduced their own local regulations prohibiting begging. In this chapter I will reflect on the reasons why the Dutch government decided to decriminalize begging generally and the reasons why local governments reintroduced this prohibition in their local regulations. The chapter addresses the question of why the local authority in one Dutch city (Groningen) prohibited begging in 2004 even though, according to the Dutch government, there was in fact no need to maintain such a prohibition in the Netherlands as a whole. The chapter will also examine how this prohibition works in practice.

The main sources of information for this chapter are government documents, especially those outlining the government's reasoning behind the bills that created and abolished the begging prohibition and those recording the parliamentary debate of these bills. Other sources of information include documents of the municipality of Groningen (including police documents and research reports) and some conversations with the Groningen city police and local government officers of the municipality of Groningen. Most of the documents and reports referenced in this paper can be found on the internet (however they are all in the Dutch language).

First, I will outline the history of the prohibition of begging in the Netherlands and the reasons why the Dutch government abolished it (paragraph 2). In paragraph 3, I will reflect upon the prohibition of begging in the city of Groningen. Specifically, I will look at the reasons why the city council of Groningen created such a prohibition. Thirdly, I will investigate how the prohibition functions in practice and whether the problems cited to justify its introduction are reduced effectively by the prohibition (paragraph 4). In paragraph 5 the results of this chapter are summarized and discussed.

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[1] Parliamentary documents *Kamerstukken II* 1996-1997 (Explanatory memorandum), 25 437 nr. 3, p. 13.

2 Prohibition of begging in the Netherlands

In this paragraph we will consider the prohibition of begging, formerly part of the Dutch criminal code but now abolished. In section 2.1 the history of the prohibition will be discussed. Section 2.2 will outline the legislative details of the former prohibition. Finally, in section 2.3, the reasons and arguments cited by the Dutch government for abolishing the prohibition of begging will be discussed.

2.1 History of the prohibition

The former prohibition of begging in the Netherlands was a relic of the French occupation of the Netherlands (1810-1813) under Napoleon. The French *Code Pénal* contained a prohibition of begging and beggars could be placed in an institution (*dépôt de mendicité*) if they were convicted of violating the prohibition. After the Netherlands regained independence in 1813, the French *Code Pénal* was converted in the Dutch criminal code.

In 1881 the Dutch government decided to create a new criminal code (*Wetboek van Strafrecht*). This new criminal code also prohibited begging. Begging was an *overtreding* (literally 'contravention' or 'infringement'), a relatively minor offence against public order. The new criminal code also contained a prohibition of begging in groups. According to the government at that time, these prohibitions were needed to protect society from disturbance of the public order caused by beggars and vagrants.[2] According to the new criminal law, people could be placed in a State-owned workhouse (*Rijkswerkinrichting*) if they were repeatedly convicted of begging. As was typical in the 19th century, the Dutch government did not have any idealistic intentions in creating these workhouses (such as poor relief or re-education); they were to be institutions in which beggars and other paupers were expected to work hard under severe conditions. Poor relief and helping beggars were the concern of the churches and the municipalities, not the national government. An example of a former workhouse can be found near the village of Veenhuizen in the Dutch province of Drenthe.

For more than a century the begging prohibition remained part of the Dutch criminal code, but in 1983 the Dutch government tried to abolish it and with it the sanction of placing beggars in State working institutions. However, the bill to do so was rejected in the senate (because another part of the bill was considered a violation of the Dutch constitution) and the begging prohibition remained.[3]

A new attempt to abolish the prohibition was launched in 1997. In that

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[2] Parliamentary documents *Kamerstukken II* 1878-1879, 110 nr. 3, p. 89 (Explanatory memorandum).

[3] Parliamentary documents *Kamerstukken I* 1993-94, 18 202, nr. 129, p. 1.

year the Dutch government sent a bill to parliament to legalize prostitution and to abolish the prohibition of begging. This time the bill was passed and from 1 October 2000 begging was no longer a crime.

2.2 The former begging prohibition

Before the abolition, begging was prohibited under Article 432 of the Dutch criminal code (*Wetboek van Strafrecht*). Article 432 forbade not only begging, but also vagrancy and procurement of prostitutes. The prohibition of begging was a contravention (*overtreding*), a relatively minor offence with a relatively low penalty (today the maximum fine would be €390 or, if the beggar was unable or unwilling to pay, a maximum detention period of 12 days). The article did not include a description or definition of the term 'begging': any form of begging was prohibited, anywhere and at any time. Playing music or selling papers on the street was not forbidden.

2.3 Why was it abolished?

As we have seen in section 2.1, begging is nowadays no longer an offence according to the Dutch criminal code. However, the Dutch government never intended to abolish the prohibition totally. In its explanation (*de Memorie van Toelichting*) of the 1997 bill to abolish the national prohibition of begging, the government stated that local authorities could create a begging prohibition if they considered it necessary to protect society from social nuisance. This fits in with the broader aims of the Dutch government to decentralize, a process started in 1982 and still continuing today,[4] by devolving more tasks to local governments and 'bringing those tasks closer to the people'.

According to the government, the Dutch criminal code already provided other opportunities to take action against begging (for example: Article 426bis of the criminal code forbids obstructing the freedom of movement of other people).[5]

The government's explanation of the bill to abolish the prohibition of begging (and to legalize prostitution) stated that there was no longer any need to maintain the prohibition.[6] The government did not explain why the reasons for the legislation were no longer applicable, nor did it explain how well the prohibition functioned (or did not function) in practice. During parliamentary debate of the bill, almost all attention was on the legalization

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4 G. de Roo. *Abstracties van planning*, Assen: InPlanning 2013, p. 180.

5 Parliamentary documents *Kamerstukken II* 1996-1997, 25 437 nr. 3, p. 13 (Explanatory memorandum) and Parliamentary documents *Kamerstukken II* 1983-1984 18 202 nr. 3, p. 6. (Explanatory memorandum). For example article 426bis of the Criminal code.

6 Parliamentary documents *Kamerstukken II* 1996-1997, 25 437 nr. 3, p. 13 (Explanatory memorandum).

of prostitution; the abolition of the begging prohibition was largely ignored.[7]

A more satisfactory answer to the question as to why the prohibition of begging should be abolished can be found in the bill proposed in 1983 but not carried, which was to have abolished the State workhouses. The government's explanation of that bill stated that begging in public spaces hardly occurred any more, owing to better economic and social conditions in the country. In cases where begging in public did occur, this was attributable to the beggars' drug or alcohol addiction. In the government's opinion these beggars should have been assisted and provided with government aid instead of being prosecuted and convicted. A second reason for abolishing the begging prohibition was that according to Statistics Netherlands (Centraal Bureau voor de Statistiek) only a few beggars were convicted of violating it. Between 1972 and 1978 only one beggar was sent to a state working institution.[8]

3 Begging in Groningen

This paragraph discusses the prohibition of begging in the city of Groningen. Its structure is similar to that of the previous paragraph: in section 3.1 the history of the prohibition in Groningen will be reviewed, section 3.2 will describe the prohibition itself and finally in section 3.3 the main arguments for creating such a prohibition will be discussed.

In this paragraph, an important distinction is drawn between 'active' and 'passive' forms of begging. The local regulations of the municipality of Groningen forbid only the first form of begging and do allow passive forms. Active forms of begging are carried out in an aggressive or offensive manner: examples include begging for money near an ATM or chasing people and constantly asking them for money. Passive forms of begging include asking for money in a friendly manner or with the use of written placards. In practice, such a distinction between these forms of begging is not always clear and can be hard to make.

3.1 History of anti-begging legislation in Groningen

In 2003, following complaints from the public about an increasing level of nuisance due to aggressive forms of begging in the city centre, the municipality of Groningen announced that it would look for opportunities to reduce these

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7 This can be deduced from various government documents, e.g.: 6. Parliamentary documents *Kamerstukken II* 1996-1997, 25 437, nr. 3, p. 13; Parliamentary documents *Kamerstukken II* 1983-1984, 18 202 nr. 3, p. 6; article 426bis of the Dutch criminal code.

8 Parliamentary documents *Kamerstukken II* 1983-1984, 18 202, nr. 3.

complaints and make proposals to prohibit begging. In September 2003, the City Executive of Groningen (*Het college van burgemeester en wethouders*) sent a proposal to the City Council to introduce a begging prohibition into its byelaws, the APVG (*Algemene Plaatselijke Verordening Groningen*, literally 'local regulations of Groningen'), the City Council (*Gemeenteraad*) being the body authorized to create such a prohibition. The proposal, intended to create a prohibition on all forms of begging, without drawing the subtle distinction between active and passive forms, was severely criticized in the City Council.[9]

In the light of this criticism, the City Executive changed its proposal so as to include the distinction between active and passive forms of begging and prohibit only the former.

This new proposal also received much criticism. Some politicians argued that the distinction between the different forms of begging would be hard for the city police, whose duty it is to enforce the APVG, to make. Others raised the social considerations underlying begging: poor people are sometimes forced to beg for money to earn a living. However, after the mayor of Groningen stated during the political debates in the City Council that the proposal should only be enforced if the beggar caused disproportionate nuisance, most political parties agreed with the proposal. During these debates, much attention was paid to the enforcement of the begging prohibition. The mayor of Groningen, as the person responsible for the enforcement of local regulations, said that he would make arrangements with the city police about the enforcement of the begging prohibition.

In April 2004 the begging prohibition was officially announced and incorporated in the APVG. It has not been changed since and remains valid today.

3.2 The prohibition in Groningen

Article 2.51 of the APVG forbids all forms of active begging in the whole city of Groningen. The prohibition is part of the chapter of the APVG about enforcement of the public order and preventing social disturbances. However, this article does not prohibit making music or selling papers on the street, which are covered by other provisions of the APVG.

In the Netherlands legislation can be enforced in two ways: under administrative or criminal law. The administrative law (*bestuursrecht*) in the Netherlands covers a variety of components, like competition law, environmental law or the enforcement of certain prohibitions. In general, prohibitions can be enforced in either way. However, article 2.51 is enforced

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[9] Letter of the college burgemeester en wethouders to the city council on 8 December 2003, reference: 172.

under criminal law, because secondary legislation (*Besluit bestuurlijke boete overlast in de openbare ruimte*) forbids use of the administrative approach. Article 6.1 of the APVG provides for a maximum fine of €3,900 for violation of the prohibition or, as an alternative if the beggar is unwilling or unable to pay the fine, detention of up to three months.

3.3 Why a prohibition?

The prohibition of begging in the APVG was created at the request of the city police. According to the City Executive's proposal there were two arguments for prohibiting begging in Groningen:

- The most important argument was an increase in the number of recorded complaints regarding active forms of begging in the city centre received by the city police and municipality from the public. A survey about the perception of the city by residents and visitors, described in section 4.2, also identified growing feelings of insecurity caused by beggars.
- A second reason was the lack of provisions under the APVG for reducing the nuisance and disruption of public order caused by begging. Although the APVG contains various provisions about maintaining public order, such as harassment in public spaces (article 2.50), begging was not always punishable under existing provisions of the APVG, however desirable it may have been in some circumstances to do so.
- A third reason can be identified for introducing a prohibition of active begging. The legislation also aims to offer social services assistance in supporting beggars (a 'carrot and stick' approach). This assistance is not provided for by the legislation itself but arose out of the way it has been implemented in practice. Although the prohibition of active begging is a legislative reaction to the nuisance it causes, the municipality of Groningen has also made provisions for supporting beggars by means of structured programmes with supervision, rehabilitation after drug or alcohol abuse and the offer of shelter. Alongside the prohibition of active begging goes an offer of help that shows beggars that there are other ways in which they can go about their begging without causing a nuisance. This process also tries to make it clear to the beggars where the boundaries are as regards what is acceptable to society. As well as imposing sanctions, the police draw beggars to the attention of the local government departments that can offer them assistance.

It is perhaps paradoxical that the legislators of the 19th century, known for their idealistic aims to lift the working class out of poverty, nevertheless failed to offer beggars any assistance, whereas in our own time, characterized in the eyes of many by selfishness and self-interest, the city of Groningen aims to support beggars by making it clear to them that there are better ways

to obtain money and by community programmes to improve their living conditions.

4 Putting the prohibition into practice in Groningen

This paragraph will consider whether the prohibition of begging in Groningen has reduced the level of nuisance in Groningen and whether this would have been possible by using other provisions in the APVG. Section 4.1 will explain how the prohibition is enforced. In section 4.2 the effects of the prohibition will be considered. Section 4.3 will examine whether other provisions of the APVG could be used to decrease the nuisance due to begging.

4.1 Enforcement of the prohibition

Enforcing the begging prohibition in Groningen is carried out by the city police, mainly through surveillance in the city centre. There are no specific enforcement programmes or priority lists for these kinds of violations of the APVG. Most policemen are familiar with most beggars in town and the beggars have a reasonable attitude towards them. If policemen observe people begging for money in a manner that can be described as active begging, they can report them in an official report *(Proces-verbaal)* to the prosecuting authority (*de Officier van Justitie*). The prosecuting authority can, within legally defined limits, impose a penalty (*strafbeschikking*) or bring the case before a judge, who can impose a heavier penalty. Beggars hardly ever appeal against an imposed fine.

Enforcing the begging prohibition has, according to the police, had a positive effect on beggars' behaviour and the ways in which they ask for money. This 'behaviour effect' on the beggar fits in with the third argument used to justify imposing the prohibition (see section 3.3).

As mentioned before (section 3.3), as well as prohibiting begging, the municipality of Groningen also focused on providing more and better assistance to beggars. The project '*Uit de goot*' (literally 'out of the gutter'), which was started in 2004, tried to offer assistance to every beggar in Groningen. The project's starting point was that nobody should have to be homeless in Groningen and that homelessness should be prevented. In pursuit of this aim, various programmes were launched, for example alcohol or drug rehabilitation programmes.

4.2 Does the prohibition work?

An important question is whether the prohibition of active forms of begging has reduced the nuisance and disturbance of public order in Groningen. Do the imposed sanctions on beggars affect the ways in which they ask for money?

The answers to these questions will be provided by comparing three indicators: the number of police reports about violations of the begging prohibition, the number of complaints from residents or visitors to the municipality of Groningen and the findings of annual surveys into public perception of life in the centre of Groningen.

There are two main counter-arguments against the approach adopted in this paper to answering these questions. The first is that the second and third indicators examine only whether the person complaining experiences actual nuisance from beggars and do not make the distinction mentioned earlier between active and passive forms of begging.

The second and more serious objection is that it is not clear whether there actually is a causal link between the prohibition itself and the indicators used to identify its possible effects on the disruption of the public order. The effects on the disturbance of public order could also be caused by factors other than the introduction of the begging prohibition into the APVG. As mentioned before, better assistance to beggars or prevention programmes could also reduce nuisance and disruption of public order arising from begging.

However, because of the limitations of this research (a permitted maximum of 10 pages and a limited period in which to write this paper), the causal link between the indicators and the begging prohibition will be assumed and the results drawn from these indicators will be used to assess the effectiveness of the begging prohibition.

Number of police reports about violations of the prohibition

The first indicator shows to what extent the prohibition of begging is enforced by the police of Groningen. If fewer police reports are written in a certain period, this can be taken as an indication that the level of nuisance has also decreased. A report by the mayor of Groningen to the city council in 2009 shows that since 2004 (the year of introduction of the begging prohibition in the APVG), 1,245 official reports had been made by the city police for violations of the begging prohibition.[10] According to the Groningen police, between 2009 and 1 April 2013, 384 official reports were made by the city police. Table one contains the number of written police reports of violations of the prohibition.

[10] Letter and attachement Mayor of Groningen to the city council on 20 November 2009, reference: BD 09.2096848 and information from the police Groningen for the years 2010 until 2013.

Table 1: Number of police reports of violations of the begging prohibition.[11]

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Reports	125	354	316	226	84	152	122	93	148	21

Table 1 shows a strong increase in the number of reports written by police in the years 2005 and 2006. After 2006 the number decreased and has since then more-or-less stabilized. From table one, it can be concluded that the level of nuisance due to begging has decreased. This conclusion is justified, according to the city police. A second conclusion that can be drawn from table one is that the number of written police reports strongly fluctuates per year. According to the city police this can be explained because some beggars are receiving assistance in some form of institution and the enforcement capacity and priorities vary each year.

The first indicator shows that the prohibition of begging initially helped to decrease the level of nuisance in Groningen. However, in 2012 it seems to suggest a subsequent increase in this level. The question is whether this increase will continue in 2013.

Thermometer-onderzoeken

Between 1998 and 2011 the municipality of Groningen commissioned annual surveys into the overall perception of the city centre by various groups, including visitors, inhabitants and shop-keepers. These surveys, known as the '*Thermometer-onderzoeken*' (literally 'Thermometer research'), made a distinction between the experiences of these groups during the day and at night. One of the subjects covered by this research programme was the nuisance due to begging. The *Thermometer-onderzoeken* showed a strong fluctuation between 1998 and 2011 in the perceived level of nuisance and disruption of the public order caused by begging. Table two contains information about the number of respondents in the survey who think begging 'always' or 'often' happens in the city centre. Table two shows these annual fluctuations.

[11] Contains the number of police reports up to 1 April 2013.

Table 2: Levels of perceived nuisance due to begging (percentages of the total respondents to the survey).[12]

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Day-time levels	28	46	50	33	46	56	42	37	36	27	23
Night-time levels	-	31	27	26	33	25	21	21	17	23	15

Table 2 shows an increase in the perceived level of nuisance due to begging in 2002 and 2003. This fits in with the municipality's justification for introducing the prohibition in 2003 (section 3.1). After the introduction of the prohibition in the APVG in 2004, the level of nuisance decreased between 2004 and 2006 and stabilized in 2007 and 2008. This reduced level of nuisance seems to have continued between 2008 and 2011. This can be deduced from the fact that after 2008 the *Thermometer-onderzoeken* did not pay any attention to begging as well as from the police reports regarding these years mentioned earlier (table 1).

The second indicator shows that the creation of the begging prohibition in the APVG resulted in a decrease in the level of nuisance arising from begging experienced by the population of and visitors to Groningen. This indicator suggests that the introduction of the prohibition was successful in reducing the level of nuisance due to begging.

Annual report of the municipality

The third indicator used is the number of complaints made by inhabitants of or visitors to the municipality of Groningen regarding begging. Residents of Groningen can complain to the municipality about nuisance in general, including nuisance arising from begging, using a facility known as the *Meldpunt* (literally, 'reporting point'). Residents can contact this facility by e-mail or telephone. The department of the municipality that manages the *Meldpunt* tries to address these complaints, for example by contacting the police, and compiles annual reports about the number and nature of the complaints received.

These annual reports showed that in 2009, 11 complaints about begging were submitted to the municipality by inhabitants or visitors. In 2010 there were 16 such complaints and in 2011 there were 33 complaints. In 2011 begging was ranked 11th in the top 20 of types of nuisance reported in Groningen. We may infer from this indicator that the nuisance due to begging increased in 2011.

In 2012, 22 complaints about begging were submitted to the municipality by the public, which indicates a decreased level of perceived nuisance in that

[12] Intraval, *Thermometer binnenstad Groningen*, Groningen/Rotterdam 2008, p. 42.

year. The reason for this decrease is, according to the annual report, that some beggars were placed in a rehabilitation clinic. However, even though the third indicator suggests a decrease in the perceived level of nuisance, the first and second indicators showed an increase in 2012. Given this contradiction, we cannot conclude whether the level of nuisance has actually decreased or increased.

4.3 The second argument: lack of possibilities in the APVG

The second argument used to justify introducing the begging prohibition was the lack of possibilities offered by the APVG for reducing the nuisance due to begging. The other provisions in the APVG, especially those regarding enforcement of public order and preventing social disturbances, were not enough to reduce nuisance due to active begging effectively.

According to the Groningen city police, whether a beggar's actions are categorized as active (illegal) or passive (legal) begging is dependent on the circumstances in the particular case. In some circumstances, the actions of the beggar could be considered active begging, but in different circumstances these same actions could not. As an example, consider the following situation: a scary-looking beggar asks a mother and her young child for money. According to the city police, in this situation the beggar is committing an offence, whereas when the same beggar asks for money from a male adult he is not. In this example the actions of the beggar cannot be qualified as disturbance of the public order (because only the persons involved, the mother and her young child, experience the nuisance) or disturbance of the traffic, so these provisions of the APVG cannot be invoked. However, the flexibility of interpretation and the strong emphasis on the circumstances of the particular case they offer make the anti-begging provisions of the APVG effective. The conclusion is that other provisions in the APVG can be used to take action against begging only if other considerations apply (for example, place, time or nature of the beggar's actions) that the provisions prohibiting begging do not require.

Another argument in favour of introducing such a prohibition into the APVG was efficiency, according to the city police. Because of the introduction of the prohibition the city police are no longer obliged to describe in detail why the actions of the beggar can be seen as a violation of the other provisions of the APVG. The assessment of the actions of the beggar as constituting an active form of begging is enough to explain why the actions are punishable.

5 Conclusion

The object of this paper was to examine why the municipality of Groningen added a prohibition of begging to its bye-laws and how this prohibition functions in practice. In this conclusion the results of the paper will be summarized and discussed.

Paragraph 2 focused on the history of the begging prohibition in the Netherlands and why the Dutch government decided to abolish this nationwide prohibition. The prohibition of begging in the Netherlands was a relic of the French occupation of the Netherlands between 1810 and 1813. After the liberation (1813) the prohibition remained. In 1983 the government tried to abolish the begging prohibition, but this attempt was unsuccessful. In 1997 a second attempt was made, which was successful, and from 2000 begging was no longer punishable under the Dutch criminal code. No reasons were given in 1997 as to why the government wanted to abolish the prohibition. The first attempt to abolish the prohibition had provided more information and arguments: due to better economic developments begging should hardly occur anymore and preference was given to government assistance. However, the government never wanted to abolish the prohibition fully, but stated that municipalities could create their own prohibition if they considered it necessary to do so to maintain public order.

Paragraph 3 described the prohibition of begging now included in the bye-laws of Groningen (APVG) and the main reasons why the municipality created such a prohibition. One feature is the distinction between active and passive forms of begging, which is important because the APVG forbids only active begging and allows passive forms of begging. The main argument in favour of introducing this prohibition was the increased nuisance in the city centre caused by beggars. A second argument was the lack of effective provisions already in the APVG for eliminating such a nuisance. A third reason was to support the assistance to beggars in that the prohibition functions as an incentive for them to improve their behaviour and seek help.

Paragraph 4 considered whether the prohibition of begging in the APVG has had a positive effect on the perceived level of nuisance due to begging in Groningen. To test this, three indicators were reviewed: the number of police reports about violations of the begging prohibition, the number of complaints from citizens or visitors made to the municipality of Groningen and reports from annual surveys about the experiences of residents and visitors in the centre of Groningen. These indicators show that the level of nuisance due to begging has decreased since 2004, when the prohibition was introduced. According to the Groningen city police the nuisance due to begging is lower than in 2000, when the nationwide prohibition of begging was abolished. An unanswered question is whether the nuisance rate has increased since 2011; the indicators are not clear about this.

The second argument mentioned above for introducing the prohibition was the lack of effective provisions in the APVG for decreasing the nuisance caused by begging. The begging prohibition is very flexible and can be used in different situations and circumstances, in which other provisions and prohibitions in the APVG are not always applicable.

The main argument in favour of creating the local prohibition of active begging was a perceived increased rate of nuisance due to begging in the city, despite claims by the Dutch government that begging hardly occurs any more. The prohibition, probably in combination with other factors such as improved assistance for beggars, appears to have reduced the levels of nuisance caused by begging. So, I conclude that the prohibition of active begging works.

Chapter 8
Is the threat of homelessness a relevant factor in sentencing?

Miko van der Veen

1 Introduction

Let us start with a few facts. Ten percent of prisoners go to prison homeless, 25% come out homeless.[1] A distinction can thus be made between those prisoners who have somewhere to live at the end of their prison sentence and those who do not. In addition, it research shows that ex-prisoners who had nowhere to live after completing their prison sentence are more likely to reoffend[2] and that homelessness and crime are related. Homelessness is a criminogenic factor.[3] These facts give rise to the question of whether the courts take this into account when sentencing. Or: is the fact that the sentence causes some individuals to become homeless and others not a relevant factor to be taken into account by the courts and are there any reasons to attach consequences to the relationship between repeated offence, criminal behaviour and homelessness? This chapter seeks to answer these questions.

I will address these questions with reference to both conventional and unconventional justification theories. If one accepts the idea that punishment is something unnatural and therefore requires justification,[4] consideration of the threat of homelessness in sentencing should obviously also be justified, or at least it should be subject to the requirement that such consideration is consistent with the justification opted for in the specific case. However the theories we deal with do not provide a complete picture of the existing doctrine. But completeness is not the objective. The objective is to show that less severe punishments, severe punishments and very severe

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1 G.W.A. van Galen, E. Niemeijer & W.M.E.H. Beijers, *Huisvestingsproblemen van (ex-) gedetineerden: een landelijk onderzoek naar aard en omvang van huisvestingsproblemen van (ex-) gedetineerden*, Amsterdam: Nederlandse Woonbond 1998.

2 E. Baldry, D. McDonnell, P. Maplesston & M. Peeters, 'Ex-prisoners, homelessness and the State in Australia', *The Australian and New Zealand Journal of Criminology* 2006, 39(1), p. 20-33. S. Metraux & D.P. Culhane, 'Homeless shelter use and reincarceration following prison release', *Criminology & Public Policy* 2004, 3(2), p. 139-160.

3 B. McCarthy & J. Hagan, 'Homelessness: A criminogenic situation?', *British Journal of Criminology* 1991, 31(4), p. 393-410.

4 Although you could see this differently, see: H. Gommer, 'Straf als evolutionair mechanisme', *DD* 2010 (35), p. 593.

punishments can all be justified. And given that (as we shall see) there is no absolute justification theory designated by the legislature, the courts and science, the courts are free to choose which theory to apply; demarcation forms no problem. This chapter can be seen as a mental exercise, but also as a tool for the practice should the threat of homelessness be allowed to be taken into consideration as a factor and justification is needed.

First of all, however, the question should be answered of how a role can be assigned to the threat of homelessness. In what type of cases can such consideration play a role. Housing problems are obviously part of the 'detention-damage' in the case of long prison sentences. The courts should not be expected to attach much importance to the threat of homelessness if the offence is murder or manslaughter. Here the interests of society in retribution or any other sentence objective has a much larger role to play. We are talking about situations in which a shorter prison sentence could be imposed (up to a year) and whether the choice for a less severe penalty in the form of community service combined with a monetary fine would not entail an irreconcilable difference in the severity of the punishment.

2 The discretion of the courts

The question as to whether the threat of homelessness should play a role in sentencing can only be answered if we have some understanding of the process that leads up to the courts' final choice, or rather that could lead to this choice. The legislature controls the choice by setting a minimum (the statutory minimum sentence) and establishing punishment modalities and specific maximum penalties for each offence. In addition, under Article 359 paragraph 5 *Wetboek van Strafvordering* (Dutch Code of Criminal Procedure (Sv)) when imposing a sentence the court is required to state its reasons, there is an additional obligation to state reasons if the suspect is addressing a first defence to the court.[5] These requirements to state reasons do not require the courts to consider specific factors and are highly limited. A standard consideration is sufficient to meet these requirements: that the sentence to be pronounced is in accordance with the severity of the offence, the circumstances in which it was committed and the person and personal circumstances of the suspect.[6] In addition the *Hoge Raad* (Dutch supreme Court) imposes a limit on the sentence to be pronounced in what the jurisprudence refers to as the *verbazingscriterium* (literally - surprise criteria).[7] Due to the fact that the sentencing is a determination of (legal)

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5 Article 358(3) Jo 359 (2) Sv.

6 *Tekst en commentaar artikel 359 Sv*, Deventer: Kluwer 2013.

7 The Hoge Raad quashes the decision if the penalty or measure in relation to the proven facts, the associated maximum sentence and the circumstances of the particular case, is such that they are not readily understandable. This involves compassionate

facts, however, the assessment is marginal, and thereby the *Hoge Raad's* ability to control the relevant factors that should be considered is limited.

Given the complexity of the sentencing decision, the legislature did not consider itself to be the right body to control this.[8] Mevis sees this more as a pragmatic choice.[9] The complexity lies in the fact that when sentencing numerous requirements have to be met that arise from the relevant sentencing objectives (the Dutch courts consider more than one specific sentencing objective[10]) as well as the requirements of proportionality, subsidiarity, the seriousness of the offence, the suspect's person and all the other circumstances under which the offence was committed. [11]

Due to the legislature's limited control, the limited requirement to state reasons and the secrecy of the council room, the sentencing process could be described as a 'black box'.[12] The relevant facts and circumstances are collected; they enter the council room and out comes a sentence. It is, however, unclear what exactly takes place in the black box of the council room; a fact that makes it difficult if not impossible to gain an understanding of the process. We are thus faced with the challenge of opening the black box and finding out what theories can play a role and what consequences these theories have for the relevance of the threat of homelessness for prisoners. Here it should be noted that there are no examples known of in the jurisprudence of cases in which it has emerged that the threat of homelessness has played a role and yet has not been considered in the (not binding) orientation points of the Public Prosecutor and those the courts use to achieve equality in sentencing.

Before the black box can be opened the ability-to-pay principle in relation to the imposition of a monetary fine is worthy of attention as an indication of the need for a retrospective approach when sentencing. In Article 24 *Wetboek van Strafrecht* (Dutch Criminal Code) it is provided that when imposing a monetary fine account should be taken of the ability to pay of the offender, given that a financial penalty of a specific amount will punish one person

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cases, such as a fine of three thousand dollars for someone with a minimum income. *Tekst en commentaar, artikel 359 Sv,* Deventer: Kluwer 2013

8 G.K. Schoep, *Straftoemetingsrecht en strafvorming*, Deventer: Kluwer, p. 183.

9 P.A.M. Mevis, 'Naar een wettelijk systeem van bijzondere strafminima?', *Trema Straftoemetingsbulletin* 2003 (2), p. 25-32.

10 In the case law retribution (Hoge Raad 26 August 1960, *NJ* 1960, 566) general prevention (Hoge Raad 10 September 1957, *NJ* 1958, 5) and confirmation of norms (Gerechtshof Leeuwarden 30 November 2011, LJN BU6455 <www.rechtspraak.nl> are named.

11 Schoep 2008, p. 188. Here it should be observed that this is also simply a collection of available factors. Indeed the above shows that there is no connection at all.

12 S. van Wingerden, M. Moerings & J. van Wilsem, 'Krijgt hij nog een kans, of rekenen we af? Rechters over de rol van het recidiverisico bij de straftoemeting', *NJB* 2013, p. 2062.

more heavily than another.[13] The requirement that the penalty should be in proportion to the ability to pay is however limited by the requirement that the penalty imposed should be in proportion to the seriousness of the offence.[14] The court may not impose a higher penalty than what it considers necessary to achieve what it sees as the objectives of the punishment[15] nor may it impose a penalty that is less severe than the seriousness of the offence justifies.[16] In other words the requirement of proportional sentencing acts both as an upper and a lower threshold. However the codification of this principle can be no more than a guideline, given that we have already observed that the courts have far reaching discretion.

3 Principle of equality

The principle of equality also gives rise to the need for a prospective approach. 'Treat equal cases equally and unequal cases unequally according to their degree of inequality'. The first part is referred to as the formal equality principle that focuses on the equal treatment of classifications (people, animals, men, women) where the substantive equality (the second part) addresses the actual consequences of the equality, the result of the classification. Depending on the classifications that one makes, the threat of homelessness can play a role on the basis of the formal principle of equality. Are people who have committed a similar offence classified as a group or is the threat of homelessness a relevant factor in the classification. Be that as it may, by application of the material principle of equality it is secured that irregularities as a direct result of the classifications are ironed out and in doing so the threat of homelessness is assigned a role.

4 Different sentencing objectives

In addition the different sentencing objectives may also require the threat of homelessness to be considered, or not at all. There is no role for the threat of homelessness if the general objective is prevention. In the event of special prevention, preventing criminal behaviour on the part of the individual, homelessness as a criminogenic factor should be considered. The same applies in the case of re-socialisation.[17] Retribution as an objective is rooted in the criminal law theories of retributivists who look at the proportional retribution given the seriousness of the offence and the culpability of the

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13 Parliamentary documents *Kamerstukken II* 1977-1978, 15012, nrs. 1-3 p. 20.
14 Parliamentary documents *Kamerstukken II* 1977-1978, 15012, nrs. 1-3 p. 42.
15 Parliamentary documents *Kamerstukken II* 1977-1978, 15012, nrs. 1-3 p. 42.
16 Parliamentary documents *Kamerstukken II* 1977-1978, 15012, nrs. 1-3 p. 22.
17 Although re-socialisation can also be seen as an instrument for prevention as a result of which the distinction made lapses.

offender.[18] The question of whether from the retributivist's perspective and thus retribution, the threat of homelessness can be considered depends on the question of what should be understood by proportionality. In its narrow meaning, in which the sentence is considered purely in terms of days/euros there is obviously no place for considering the threat of homelessness. If the relative severity of the sentence is assigned a role, there is. Thus the basic principle of the retributivists, just like retribution (as outlined above) as an objective, does not solve the problem given that the question still remains as to whether or not the threat of homelessness may be taken into consideration. Albeit that the question is limited and redirected to address the substance of the proportionality assessment.[19]

The contradiction between the retributivist and the utilitarian is classic. The latter punishes if the punishment contributes a greater benefit to society as a whole. We have already established that homelessness is a criminogenic factor as a result of which allowing the threat of homelessness becomes relevant (if homelessness can be prevented). Alongside homelessness as a criminogenic factor other costs passed on to society due to the homelessness of the individual concerned can likewise be pointed out.

5 Law and economics

The economist would however argue that allowing the threat of homelessness to be considered depends on the fact of whether the offender knew that homelessness might result from the sentence. The rational choice theory was developed based on the assumption that people are inclined to all evil and that man is a rational being who always makes the choices that benefit him the most.[20] Offences are committed as the result of the offender weighing the estimated advantages and disadvantages (severity of the sentence and the chance of being caught). If this consideration favours the advantages the offender will commit the crime, if this is not the case he will abide by the rules.

If the offender was aware of the chances of becoming homeless as a consequence of the sentence then he apparently estimated the advantages as being higher than the person who does not take the threat of homelessness into account. This means that the courts should not take the threat of homelessness into account. Indeed, should they do so, then the balance for the person who did take this into account will lean even more towards the advantages. As a result, other persons who likewise estimate the

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18 Van Wingerden, Moerings, Van Wilsem 2013.

19 J.W. de Keijser, *Punishment and purpose: From moral theory to punishment in action* (diss. Leiden), Amsterdam: Thela Thesis 2001.

20 H. Elffers, 'Afschrikken en het aanleren van normen. De theorie van Kelman toegepast op het strafrecht', *JV* 2008(2) p. 83.

advantages as being higher will be more likely to offend. In this case the threat of homelessness is a corrective factor for the person estimating the advantages as being higher than do other people.[21] For those who had no idea that homelessness might be the consequence of the sentence this need does not arise given that the consequences of the sentence might be more costly than would be necessary to stop them from offending. As a result the paradoxical situation arises that either disproportionality has to be accepted or more crime.

Based on the idea that some consider homelessness as a factor in their decision to commit an offence, and others do not, there is also a greater need for standards to be confirmed. In relation to the same offence one person is more willing to sacrifice something if he is caught, namely his house. The standard was apparently of less importance than it was to the person who did not take homelessness into account.

6 How far should we go?

Related to the question of whether the threat of homelessness should be taken into account is the question of how far the courts should go in taking into account the consequences of the sentence they impose. Should the consequences of the sentence also affect the family members of the offender?[22] Being cast off by the family as the result of the imprisonment for example. What if the offender's wife is pregnant? And should the consequences of missing out on raising young children for a while play a role? And what role is assigned to the stigmatisation in connection with the imprisonment?[23]

The answer to these questions depends on the same factor as the answer to the question of whether the threat of homelessness should play a role, namely how the courts wish to justify the sentence. Consideration of the negative consequences of the penalty can however always be justified by the same arguments. The danger of a slippery slope reveals itself. A slippery slope that that can only be escaped from depending on the opinion of the person making the choice[24] and whereby the importance attached to the different

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21 Note here that advantages should be understood to include more than just money matters. It could, for example also include acquiring goods in an easy, albeit criminal manner.

22 For example, being unable to standby in the event of an emergency because the driving licence has been withdrawn. Rechtbank Assen 11 December 2007, LJN BC0089 <www.rechtspraak.nl>.

23 Illustratrative for the multiple factors that influence the impact of a sentence on an offender is the list of 32 factors drawn up by Jeremy Bentham. J. Bentham, *Principles of morals and Legislation*, 1789, chapter VI, section 6. <www.constitution.org/jb/pml.htm>.

24 Albeit it that in cases where the consequences relate to persons other than the

arguments is decisive. However, in view of the fact that it is uncertain on what such an opinion can be based, given that the same argument can apply for all the factors, any difference in how the factors are assessed will be very arbitrary. Thus, from the point of view of consistency and comprehensibility it would seem that the only valid question is *whether* future factors should play and role and not *which*.

In the discussion on this Ashworth argues that allowing factors to be considered that may play a role in the future leads to discrimination.[25] He believes the strongest distinction in the argument is made between having or not having work.[26] The threat of homelessness will be most likely to become a reality as the result of loss of income due to loss of work. Allowing the courts to consider the threat of homelessness thus means that the difference between the working class and the unemployed is institutionalised through the courts. The desirability of this depends, however, on a person's political opinions.

7 Conclusion

We can conclude that the courts have far reaching discretion when sentencing. They are free to choose the objectives of the sentence and can give substance to any factor they consider to be important. We have also seen that the threat of homelessness can be justified as a relevant factor in several ways. When the objectives of the sentence are general and special prevention, retribution and re-socialisation, it can be argued that the threat of homelessness should have a moderating affect or, (depending on the proportionality assessment) no affect at all. In the field of law and economics the economist will, in the case of offenders who were aware of the possibility of homelessness, vehemently oppose a less sever sentence being imposed and from the point of view of confirmation of standards there is even a strong case for imposing a harsher sentence. In other words: all the options are defendable and the discretion of the courts means that all the options are allowable.

offender the consideration in the sentencing with reference to everyone's social risk should be rejected.

[25] A. Ashworth, *Sentencing and Criminal Justice,* Cambridge: Cambridge University Press, Cambridge 2010, p. 185.

[26] As for example is referred to explicitly as mitigating circumstances in Swedish law, section 5 of chapter 29 (5) Swedish Criminal Code.

Part IV
Homelessness and immigration

Chapter 9
Access to social assistance for EU-citizens in Germany

Valentin Günther

1 Introduction

1.1 Preface

Towards the end of 2013 and in early 2014, newspaper articles on immigration from Bulgaria and Romania, social-benefits tourism, restrictions on the free movement of EU citizens and many other subjects supposedly connected to the end of transitional controls on the free movement of Bulgarians and Romanians on 1 January 2014 were published almost daily.

From this date onwards, residents of these countries enjoy the same rights as any other citizens from an EU member state, making the partly restrictive regulations on work permits and the subsequent limitations of their right to stay based on their status as workers obsolete.

Despite the fact that the influx of immigrants feared after Polish workers were given the unlimited right to freedom of movement on 1 May 2010 did not become a reality,[1] the debate on the (legal) problems in relation to the migration of EU citizens seems to be just starting. Voices in the political sphere and in the media are echoing those in 2010, warning that the German economic and welfare system is neither sufficiently prepared nor capable of bearing the additional costs and negative effects that will assumedly be caused by new immigration waves. But while the main fear in 2010 was that foreign workers from the new member states (particularly Poland) would harm the German economy by offering their labour for unusually and unreasonably low prices, the concerns now focus directly on the functioning of the welfare system. Newspapers and politicians are forecasting a possible poverty-driven migration of the Roma population and increased misuse of social benefits, based on the fear of social-benefits tourism. There are widespread calls for effective preventive systems and restrictions on the right to free movement.[2]

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[1] Official statement of the German government can be found in: Bundestagsdrucksache No. 17/5132.

[2] J. Jahn, Wir sind am Beginn einer neuen Migrationswelle, *Frankfurter Allgemeine Zeitung,* 1 December 2013, available online: <www.faz.net/aktuell/wirtschaft/recht-steuern/hartz-iv-fuer-eu-buerger-wir-sind-am-beginn-einer-neuen-migrationswelle-12689884.html>, last accessed on 14 January 2014.

But these forewarnings, such as those published in the *Deutsche Städtetag* as early as January 2013,[3] are accompanied by a legal uncertainty regarding exclusionary provisions that can be found in the *Sozialgesetzbuch II*[4] which is used as a supporting argument by those voices that see a defenceless Germany facing a new wave of migration.

1.2 Methodology and structure

This chapter addresses the main social security schemes that are of interest for EU citizens in need. Although discussions on this issue are generally related to specific nationalities (Polish, Romanian, Bulgarian citizens) this chapter does not make this distinction because from a legal point of view all EU citizens have, at least since 1 January 2014, the same rights and obligations.[5] Indeed, while it is true that Croatian nationals will still need a work permit and are thus not fully free to move within the EU, this distinction will have almost no affect on their entitlement to social assistance.

After a brief explanation of the concept and idea of the social system in Germany, the entitlement requirements are examined in more detail. Special emphasis will be placed on the vague legal situation concerning the exclusion of EU citizens from *Grundsicherung für Arbeitsuchende*[6] if their right to stay can only be derived from their seeking a job. Unfortunately, it goes beyond the scope of this article to examine all legal problems and suggest precise and profound solutions. This section is therefore intended to shed light on those legal matters in German social law that are currently unclear.

The aim of this chapter is to answer the question of how an EU national can claim state assistance in Germany, in particular: *Grundsicherung für Arbeitsuchende, Sozialhilfe* and *Kindergeld*. Hopefully after reading the chapter the reader will have gained insight not only into the social assistance schemes and the entitlement requirements, but also into the legal framework with all its judicial uncertainties and pending court cases.

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3 Deutscher Städtetag, Positionspapier des Deutschen Städtetags zu den Fragen der Zuwanderung aus Bulgarien und Rumänien, 22 January 2013.

4 The German Code of Social Law consists mainly of twelve books, called Sozialgesetzbücher. Nevertheless, additional laws that regulate social issues can be found but they have no relevance concerning this contribution.

5 Due to equivalent treaties, citizens from Norway, Switzerland, Iceland and Liechtenstein are included as well (Agreement on the European Economic Area, 02 May 1992, Official Journal of the EU C. 03 January 1994, L 001/3, arts 28 ff.; The agreement on the free movement of labour between Switzerland and EU/EFTA Member States f. 21 June 1999, Official Journal of the EU f. 30 April 2002 L 114/6, arts. 3 et seq). Whenever there is a reference to EU citizens, these groups are meant as well.

6 In this article the term 'Grundsicherung für Arbeitsuchende' will be used but 'Arbeitslosengeld II' is a common legal term as well whereas 'Hartz IV' is used in colloquial language.

This chapter focuses exclusively on social assistance. Other social security schemes, for instance health insurance, family benefits other than *Kindergeld,* education benefits and social housing are omitted. The same applies for groups of people who do not hold EU citizenship. The limited extent of this chapter makes it necessary to focus on individuals without including family members. The special social assistance schemes for disabled persons will also be left out of consideration.

2 Entitlement to social assistance for EUR citizens

2.1 The social system and social law in Germany

Germany's welfare system is based on Article 20(1) *Grundgesetz* (the Federal Constitution (GG)). This article states that Germany is a *Sozialstaat* (social state) which implies social responsibility for its citizens. The concept '*soziokulturelles Existenzminimum*' (socio-cultural subsistence minimum) and a state duty to secure a humane minimum standard of life, was created with reference to Article 1 GG, which guarantees the right to human dignity. This abstract constitutional right is translated into a material right through a system of social laws.

In Germany, it is common to speak of *Sozialrecht* (social law), rather than social security law. Almost all the different laws on social aspects are merged into one single book of law, the *Sozialgesetzbuch* (SGB) that consists of twelve parts. Within this framework, the area of German social security was drastically reformed by the so-called *Hartz committee*. The fourth wave of these reforms (*Hartz IV*) was implemented in 2005 and introduced a differentiation between *Grundsicherung für Arbeitsuchende* for able bodied unemployed persons and *Sozialhilfe* for those who do not fall under the scheme of *Grundsicherung für Arbeitsuchende*. In fact, both schemes are based on similar principles and usually provide a monthly payment of up to EUR 391 (as of 1 January 2014) for a single (parent) and costs for housing. A major reason for supporting the introduction of the new scheme *Grundsicherung für Arbeitsuchende* was the need to increase the efforts of the non-working population to find and take up an employment in order to reduce reliance on assistance from the community.[7]

The *SGB II* provides basic security benefits for job-seekers without rights to the usual unemployment benefit scheme, *Arbeitslosengeld I*, either because they never paid insurance contributions or because the maximum length of one year has expired.

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7 C. Burkiczak, in: C. Rolfs / R. Giesen / R. Kreikebohm / P. Udsching (eds.), *Beck´scher Online Kommentar Sozialrecht*, Munich: C.H.Beck 2013, § 2 SGB II, Rn. 1.

Those who receive social assistance under one of the two schemes also enjoy health insurance either through automatic membership or assumption of costs.

Due to the fact that most of the jobless persons are capable of work and subsequently the regulations of *SGB II* will be applied and not those of *Sozialhilfe* in *SGB XII,* the practical importance of the *Sozialhilfe* scheme has decreased. However, it is still of relevance especially when it comes to the interdependence between the regulations and exclusion grounds of both schemes.

2.2 General entitlement requirements for Grundsicherung für Arbeitsuchende

According to the *SGB II,* every able-bodied person between the ages of 15 and 65, capable of work and with a habitual residence within the state territory of Germany (Section 7 (1) SGB II) who is in a situation of need is entitled to receive *Grundsicherung für Arbeitsuchende.* However, specific exclusion grounds create a much more complex situation that will be discussed later.

Earning Capacity

While the age restrictions should usually not cause many difficulties, the ability to work as a condition that must be met to fall under the scope of the scheme of *Grundsicherung für Arbeitsuchende* should be examined a bit further. Generally speaking, this means that the applicant must be able to work. To fulfil this requirement it is not only necessary that the individual is actually able to work, meaning physically and in terms of age, but also that a person should be legally able to work.

Section 8(2) SGB II states that the individual must at least potentially be able to qualify for a work permit. EU citizens are free as workers to move within the EU (Article 45(1) AEUV) and take up work in any EU member state and therefore this condition is not an obstacle for nationals of an EU member state. Since the lifting of the restrictions for Romanian and Bulgarian citizens on the 1 January 2014, there are no longer specific requirements concerning their ability to work. However, even before the restrictions were suspended, from a legal point of view nationals from those two member states were already capable of working within the meaning of Section 7(1) SGB II, because (the new) Section 8(2) SGB II explicitly states that the theoretical, potential legal ability to work is sufficient even when this is subject to the granting of a work permit.[8] This argumentation now applies to nationals from Croatia so

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[8] *Bundestagdrucksache*, No. 17/3404, p. 93. Bundesagentur für Arbeit, *Fachliche Hinweise zu § 8 SGB II* (as at 21 January 2013), Rn. 2.4.3, available online: <www.arbeitsagentur.de/zentraler-Content/A01-Allgemein-Info/A015-Oeffentlichkeitsarbeit/Publikation/pdf/Gesetzestext-08-SGB-II-Erwerbsfaehigkeit.pdf>, last accessed on 14 January 2014.

that a distinction between individuals from this new member state and other EU citizens is not necessary in order to explain the entitlement conditions of social assistance schemes.

Habitual Residence

The next general requirement that has to be fulfilled by an EU citizen is the habitual residence requirement (Section 7(1) s 1 no. 4 SGB II). Another article, scilicet Section 30(3) s 2 SGB I gives a hint as to what can be understood as habitual residence. It states that the habitual residence can be found at a place where the individual lives under circumstances that evince that he or she will not only stay at this place or within this area temporarily.[9] Consequently, persons with the intention to stay only for a limited period (tourists, seasonal workers, au-pairs) are not entitled to gain benefits under the *Grundsicherung für Arbeitsuchende* scheme.

Usually, the registered domicile functions as the habitual residence. However, for unregistered persons the factual residence is decisive.[10] External circumstances that indicate the individual's intention to become a permanent resident should be considered. Behaviour such as house hunting, an application for a *Wohnberechtigungsschein* (certificate of eligibility to public housing), job seeking or the distance to relatives will be considered as expressions of that individual intention.[11]

Homeless people can also have a habitual residence.[12] A house or flat is not required and although the availability obviously facilitates the work of the *Bundesagentur für Arbeit* (Federal Employment Agency), it is not a positive entitlement condition.[13]

Furthermore, the *Bundesagentur für Arbeit* requires the stay to be legal so that the applicants need a right of residence.[14] However, courts question this

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9 Section 30 (3) s 2 SGB I - in German: 'Den gewöhnlichen Aufenthalt hat jemand dort, wo er sich unter Umständen aufhält, die erkennen lassen, daß er an diesem Ort oder in diesem Gebiet nicht nur vorübergehend verweilt.'

10 Bundesagentur für Arbeit, Fachliche Hinweise zu § 7 SGB II (as at 20 December 2013), Rn. 7.2 , available online: <www.arbeitsagentur.de/zentraler-Content/A01-Allgemein-Info/A015-Oeffentlichkeitsarbeit/Publikation/pdf/Gesetzestext-07-SGB-II-Berechtigte.pdf >, last accessed on 14 January 2014.

11 K. Brandmayer, in: C. Rolfs / R. Giesen / R. Kreikebohm / P. Udsching (eds.), *Beck´scher Online Kommentar Sozialrecht*, Munich: C.H.Beck 2013, § 2 SGB II, §7 Rn 5.

12 Bayerischer Verwaltungsgerichtshof, 25 January 2001, 12 B 99.512; W. Spellbrink & G. Becker, in: Eicher (ed), *SGB II - Grundsicherung für Arbeitsuchende - Kommentar*, Munich: C.H.Beck 2013, § 7 SGB II Rn 20.

13 Bayerischer Verwaltungsgerichtshof, 25 January 2001, 12 B 99.512.

14 Bundesagentur für Arbeit, Fachliche Hinweise zu § 7 SGB II (as at 20 December 2013), Rn. 7.2 , available online: <www.arbeitsagentur.de/zentraler-Content/A01-Allgemein-Info/A015-Oeffentlichkeitsarbeit/Publikation/pdf/Gesetzestext-07-SGB-II-Berechtigte.pdf >, last accessed on 14 January 2014.

necessity[15] while seeing the expressly mentioned requirements of Section 7 SGB II as exclusive[16] and in January 2013 the *Bundessozialgericht* made a clear hint that in the court's view, the habitual residence is detached from a specific right to stay.[17] Although there are good arguments for the opinion of the court, the question as to whether a legal stay is a precondition of a habitual residence need not be answered here, because it can be assumed for EU citizens that their stay (derived from the right of article 21(1) AEUV) is legal until an authority decides to withdraw the right to stay.[18]

2.3 Right to free movement and right of residence for EU citizens

In discussions on current developments in Europe and new immigration waves potentially entering social systems, there are voices calling for a 'restriction of the right to free movement' or the 'expulsion of fraudsters'. But these are not the only reasons for taking a brief look at the privileged right of residence of EU citizens. The right of residence and the reason for the stay that is connected to this are of crucial significance for entitlement to social assistance, in particular *Grundsicherung für Arbeitsuchende*. This is because those people who can only derive their right to stay from the reason that they are searching for a job are excluded from this benefit scheme.

Before discussing the exclusionary provisions in the *SGB II*, a brief look at the different options open to an EU citizen regarding his right to stay could be useful.

EU citizens have a privileged right of residence, which also includes their family members (Section 3 FreizügG/EU). In general terms, the right of free movement is intrinsic in the status of EU citizenship. As long as an EU citizen does not have a permanent right of residence (which is the case after 5 years of legal stay in Germany (Section 4 lit a FreizügG/EU)) the right of residence can be derived from different grounds. Furthermore, a differentiation between the first three months and the period thereafter must be made.

Right of Residence: First Three Months of Stay
During the *first three months* of stay, an EU citizen enjoys an unconditional right of residence as do his or her family members. Only a valid identification

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15 Bundessozialgericht, 16 December 2008, B 4 AS 40/07 R, Rn. 13; Bundessozialgericht, 19 October 2010, B 14 AS 23/10 R, Rn. 13 explicitly has not answered the question finally.

16 Landessozialgericht Hessen, 14 October 2009, L 7 AS 166/09 B ER, Rn. 19.

17 Bundessozialgericht, 30 January 201, B 4 AS 54/12 R, Rn. 19

18 F. Schreiber, 'Europäische Sozialrechtskoordinierung und Arbeitslosengeld II-Anspruch', *Neue Zeitschrift für Sozialrecht* 2012 (17), p. 647 (649) with further references.

card or passport is needed (Section 2 FreizügG/EU). This unconditional right is renewed after leaving and re-entering the host member state.

Only one exception to this right of residence during the first three months is laid down. Article 14(1) Directive 38/2004 (DIR 38/2004) states that Union citizens and their family can only rely on their right 'as long as they do not become an unreasonable burden on the social assistance system of the host Member State' (article 14(1) DIR 38/2004).

Right of Residence: After Three Months

Once the unconditional right of residence ends *after three months*, certain conditions must be fulfilled in order to stay in the host country. According to Section 2 FreizügG/EU every EU citizen has the right of residence as long as they are a member of one of the following groups:

- workers or people in education
- jobseekers who are looking for work with sufficient seriousness and within reasonable time and prospects of success
- EU citizens who have a remaining right of residence after previous work
- unemployed persons and their relatives if they have sufficient means for subsistence and health insurance
- self-employed (establishment and services)
- EU citizens as receivers of services

Until 29 January 2013, EU citizens with the right to free movement received a residence permit (Section 5 FreizügG/EU old version) ex officio at the moment of registration with a local authority. As the right of residence was and is derived directly from the status as an EU citizen, this residence permit was only of a declaratory nature and was consequently disposed of this year.

Right of Residence for: Workers, Self-employed and Job-seekers

After three months, the unconditional right of section 2(5) FreizügG/EU to stay in the host state expires. Every national of an EU member state therefore needs a specific reason to stay. For EU migrants, the rights of residence based on their status as either a *worker*, *self-employed* or *job-seeker* are of particular interest.

Worker

The scope of the meaning of *worker* has to be interpreted in light of EU law. Thus, the concept of the term must be applied in a wide sense.[19] Only

[19] In art 2.2.1.1 of the Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU, the administrative instruction, it is laid down (translated): 'The judicial classification of the relation between receiver and provider of manpower on basis of national law is not of relevance.'

activities that are clearly subsidiary and insignificant are excluded. According to settled case law, the hallmark of a relation of employment should be whether a person provides their manpower for a certain time under external direction and receives payment in return.[20] Neither the number of working hours, nor the duration of the working contract, nor the amount of earned money is decisive, but the subordinate relationship of a person to another instance. A minimum of working hours has not yet been fixed by the ECJ, albeit it has ruled that 5.5 hours per week for a cleaning job are sufficient.[21] A part time job, with payment that is not high enough to cover all living costs, will usually be considered as a relationship of employment. The *Bundessozialgericht* has adopted the interpretation of the ECJ and acknowledged the status as a worker obiter dictum on 19 October 2013 for a person with a monthly income of around EUR 100 and 7.5 hours of work per week.[22]

Self-employed

People who do not fall under the definition of a worker can also rely on the right to free movement of establishment. Self-employed persons can register their business under the same conditions as German nationals. The courts in Germany regularly require an 'economic activity for an undefined period of time by means of a constant establishment, so that a merely formal act like the registration of trade is not sufficient.'[23] Every legal service that is provided for remuneration can fall under the scope of a self-employment activity.[24] It is not required that the business generates enough profits for the self-employed person to be able to cover all their costs of subsistence, but recognisable and reasonable chances of success are necessary.[25]

Job-seeker

If none of these conditions are fulfilled, the person can be categorized as a job-seeker. As long as a person is searching for a job and as long as this search has reasonable chances of success, the individual cannot be expulsed (article 14(4) lit b DIR 38/2004).[26] To subsume a case under this definition, it is helpful if the person concerned is officially registered as a job seeker at the *Bundesagentur für Arbeit* or at the so called *Job Centre*, although this cannot be regarded as

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20 ECJ 3 June 2009, C-22/08, C-23/09 (Vatsouras/Koupatantze).

21 ECJ 4 February 2010, C-14/09 (Genc).

22 Bundessozialgericht, 19 October 2010, B 14 AS 23/10 R, Rn. 18.

23 Bundessozialgericht, 19 October 2010, B 14 AS 23/10 R, Rn. 19 - in German: 'Voraussetzung ist (...)dass eine wirtschaftliche Tätigkeit auf unbestimmte Zeit mittels einer festen Einrichtung in einem anderen Mitgliedstaat tatsächlich ausgeübt wird (...), sodass alleine ein formaler Akt (...)), wie die Registrierung eines Gewerbes nicht ausreichend ist. '

24 Bundesverwaltungsgericht, 24 October 2002, 1 C 31/02.

25 Hessisches Landessozialgericht, 13 September 2007, L 9 AS 44/07 ER.

26 ECJ 26 February 1991, C-292/89 (Antonissen).

a requirement. In the administrative instructions regarding the *FreizügG/EU*, one can read that a reasonable chance of success can be assumed 'if the job seeker will presumably be successful with their applications on the basis of their qualifications and the current demand in the job market. This has to be declined if there is no serious intention of takings up an employment.'[27] Still, this illustrative administrative regulation leaves a lot of room for interpretation. The requirement of serious job seeking will be tested on the basis of the behaviour of the claimant. An individual can, for example, prove his or her serious intent by registering as jobless at the *Bundesagentur für Arbeit*, attending job interviews or by collecting job advertisements in newspapers.[28]

The EU citizen directive contains no explicit provisions on the length of the right to stay for job seekers. Moreover, the ECJ also found that it should be up to the member states to define a reasonable time for a promising search for a job, as long as this period is not unreasonably short.[29] The German law that implements the EU citizens' directive, the *FreizügG/EU,* has not set a definite limit for the right to stay on the grounds of job seeking.

All three statuses provide an EU citizen with a right of residence. Thus, a person who is classified as a job-seeker can stay in Germany as long as an authority has not found that the status no longer remains and has withdrawn the right of residence. The differences between the reasons that lead to a right of residence play a role when it comes to the entitlement to social benefits.

The Loss of the Right of Residence

As long as it is not established by an administrative act (that can be challenged in court) the stay must be considered to be legal. But what applies to the right of residence within the first three months of the stay remains valid for the following period as well: if a Union Citizen becomes 'an unreasonable burden on the social assistance system of the host Member State' (Article 14(1) DIR 38/2004), the right of residence can be restricted. But it is forbidden to expulse EU citizens relying on social assistance automatically without an individual test (Article 14(2) DIR 38/2004). The ECJ has explicitly stated in a recent decision that 'the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.'[30]

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[27] Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU, art. 2.2.1.3 - in German: 'Begründete Aussicht, einen Arbeitsplatz zu finden, kann angenommen werden, wenn der Arbeitssuchende aufgrund seiner Qualifikation und des aktuellen Bedarfs am Arbeitsmarkt voraussichtlich mit seinen Bewerbungen erfolgreich sein wird. Dies ist zu verneinen, wenn er keinerlei ernsthafte Absichten verfolgt, eine Beschäftigung aufzunehmen.'

[28] G. Brinkmann, in: Huber (ed), *Aufenthaltsgesetz*, Munich: C.H.Beck 2010, § 2 FreizügG/EU, Rn. 22.

[29] ECJ 26 February 1991, C-292/89 (Antonissen).

[30] ECJ 19 September 2013, C-140/12 (Brey), Rn. 75.

Beside the opportunity to limit the right of residence because the immigrant has become an *unreasonable burden*, Section 6(1) FreizügG/EU also provides for the possibility to expulse an EU citizen if a serious threat is posed to public policy, public security or public health.

2.4 Exclusionary provisions of the SGB II and legal conflicts

The German social assistance schemes, *Grundsicherung für Arbeitsuchende* as well as *Sozialhilfe*, aim to guarantee a life in human dignity, which is a state obligation (Article 1(1) GG). This guarantee also counts for persons residing within the state territory of Germany who are not necessarily German. Because the German government and parts of society fear that the social system could be undermined if too many foreigners receive social benefits under one of the general schemes, exclusionary provisions have been included in the relevant chapters.

The main social benefit scheme is, as mentioned previously, *Grundsicherung für Arbeitsuchende.* One section of the *SGB II* contains a passage of text that caused heated legal debate in the German academic world and recently also in the wider public.

According to Section 7(1) s 2 the following groups are excluded from social assistance:

> 1. Foreigners and their family members who are neither workers or self-employed, nor have a right to free movement on basis of Section 2 (3) FreizügG/EU, for the first three months of their stay,
> 2. Foreigners and their family members whose right of residence results only from the purpose of job-seeking[31]

A very similar provision can be found for *Sozialhilfe* in *SGB XII*.[32]

Not only one, but several conflicts have emerged based on the relationship of this rule with certain non-discrimination articles that affect EU law as well as national law.

First, when it comes to the free movement of EU citizens the Directive 38/2004 comes into mind. This contains a non-discrimination provision

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[31] Section (1) s 2 SGB II - in German: 'Ausgenommen sind 1. Ausländerinnen und Ausländer, die weder in der Bundesrepublik Deutschland Arbeitnehmerinnen, Arbeitnehmer oder Selbständige noch aufgrund des § 2 Absatz 3 des Freizügigkeitsgesetzes/ EU freizügigkeitsberechtigt sind, und ihre Familienangehörigen für die ersten drei Monate ihres Aufenthalts, 2. Ausländerinnen und Ausländer, deren Aufenthaltsrecht sich allein aus dem Zweck der Arbeitsuche ergibt, und ihre Familienangehörigen.'

[32] See Section 23 (3) SGB XII.

that prohibits unequal treatment on grounds of nationality (Article 24(1) DIR 38/2004). However, unlimited non-discrimination under this directive is only granted to persons with the status worker or self-employed. For job-seekers or during the first three months of the stay, exceptions concerning the access to social assistance are allowed (Article 24(2), Article 14(4) lit b DIR 38/2004).

A further provision of EU law can be found in Regulation 883/2004 (REG 883/2004). This regulation demands from member states that every EU citizen shall have the same access to social security as the domestic population (Article 4 REG 883/2004). The regulation deals with contribution-based social security systems and special non-contributory cash benefits (Article 3(2) and (3) REG 883/2004), but sole social and medical benefits are excluded.

Furthermore, the European Convention on Social and Medical Assistance (ECSMA) of 1952, to which Germany is a contracting state[33], determines that every national of one of the contracting states shall have the same access to social and medical assistance as a domestic national (article 1 ECSMA).

These provisions give rise to the presumption that national regulations are not in accordance with superior law.

The Personal Scope of the Exclusion

First of all, it must be said that this exclusionary provision does not apply to individuals that are already active as workers or self-employed persons and it should be noted here that the ECJ uses a very broad interpretation of the terms *worker* and *self-employed*.

Additionally, those EU citizens do not fall under the scope of the exclusionary provision of Section 7(1) s 2 SGB II if one of the following conditions is fulfilled, because under these circumstances the status of worker (Article 45 Treaty on the Functioning of the European Union (TFEU)) or self-employed (Article 49 TFEU) persists:

- Temporary reduction of earning capacity due to illness or accident (Section 2(3) s 1 no 1 FreizügG/EU)
- Involuntary unemployment or end of self-employment as a consequence of circumstances that were beyond the influence of the individual. After at least one year of employment/exercise it persists for an unlimited period (Section 2(3) s 1 no 2 FreizügG/EU). After a shorter period it only persist for six months (Section

[33] European Convention on Social and Medical Assistance from 11 December 1953, accepted by the German Government on 15 May 1956; other contracting parties are: Belgium, Denmark, Germany, Estonia, France, Greece, Great Britain, Ireland, Italy, Luxembourg, Malta, The Netherlands, Portugal, Sweden, Spain such as the third countries Norway, Iceland and Turkey.

2(3) s 2 FreizügG/EU)
- Start of apprenticeship, if a connection between the apprenticeship and the earlier employment exists (Section 2 (3) s 1 no 3 FreizügG/EU)

Secondly, the exclusionary provisions do not apply if the right to stay can be derived from grounds other than job-seeking. In practice this exception from the exclusion can play a crucial role. The *Bundessozialgericht* ruled that a pregnant woman from Bulgaria is entitled to *Grundsicherung für Arbeitsuchende* before the birth of the child because her reason to stay cannot only be derived from her seeking for a job, but also from her legitimate aim of family reunification and the state obligation to protect family life.[34] Thus, it is practicable for EU citizens currently claiming *Grundsicherung für Arbeitsuchende* to find some reason other than job seeking for their stay in Germany. A rejection of such cases obviously is not in accordance with the law, because if an EU citizen can rely on another legitimate reason that grants him a right of residence, for instance as it is the case for family members of workers, this EU citizen has a valid claim for social assistance.[35]

Bearing these exceptions to the exclusionary provision of Section 7(1) s 2 no. 1 and no. 2 SGB II in mind, the exclusion applies to all EU citizens staying for a period which is shorter than three months or whose right to stay can only be derived from their job-seeking and none of the aforementioned exception grounds apply.

However, this exclusion is still an important and almost unsurmountable obstacle for many EU citizens that enter Germany full of hope for new or better employment opportunities and end up facing a serious threat to their wellbeing which is increased by the denial of social benefits.

Below a short overview of possible conflicts with EU and international law is provided, not for the purpose of presenting conclusive argumentation, but to create awareness of the problems.

Legal Discussion

Conflict with DIR 38/2004, Article 24(2)
Article 24(1) DIR 38 /2004 guarantees a right to enjoy the same treatment as nationals of the guest state:

> Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit

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34 Bundessozialgericht, 30 January 2013, B 4 AS 54/12 R, Rn. 21 et seq.
35 Bundesagentur für Arbeit 2013, Rn. 7.7.

> of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

However, paragraph 2 of the same article allows member states to make exceptions for the entitlement to 'social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b).'

The German legislator used this freedom provided in the directive to implement a *social assistance* exclusion.[36] According to this, the Union citizen directive could provide suitable grounds for EU member states to justify discriminating against nationals from other member states in the field of *social assistance*. Hence, the important question is whether *Grundsicherung für Arbeitsuchende* can be classified as *social assistance* in the meaning of the directive or whether it is a different kind of benefit.

There are good arguments to support the suggestion that *Grundsicherung für Arbeitsuchende* is a *social assistance* benefit. First of all, according Section 1(1) SGB II one of the aims of *Grundsicherung für Arbeitsuchende* is to provide a minimum subsistence level. The same goal can be found in the *Sozialhilfe* scheme that covers all cases that do not fit into another programme and is unquestionably categorized as *social assistance*. Furthermore, both *Grundsicherung für Arbeitsuchende* and *Sozialhilfe* are financed by taxes, which is usually a typical characteristic *social assistance* schemes.

On the other hand, *Grundsicherung für Arbeitsuchende* is related to the earning capacity of an individual. The ability to work is a precondition to entitlement; a link that connects the scheme to the labour market rather than to social assistance.[37] Furthermore, the competence lies with the *Bundesagentur für Arbeit*, an institution that, as the name already suggests, is entrusted with issues concerning labour and unemployment.

Both sides have good arguments,[38] but so far, neither the ECJ nor the German legislator have given a concrete ruling on the classification of *Grundsicherung für Arbeitsuchende* and the case law of the *Landessozialgerichte* is quite diverse.[39]

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[36] Bundestagsdrucksache, No.16/5065, p. 234.

[37] ECJ 3 June 2009, C-22/08, C-23/09 (Vatsouras/Koupatantze).

[38] For further details concerning the discussion please see: T. Kingreen, 'Staatsangehörigkeit als Differenzierungskriterium im Sozialleistungsrecht', *Die Sozialgerichtsbarkeit* 2013 (3), p. 132 (136) and U. Kötter, 'Ansprüche von BürgergInnen der Europäischen Union auf Leistungen der sozialen Grundsicherung nach dem SGB II zwischen Gleichbehandlungsanspruch und Demokratieprinzip', *Informationen zum Arbeitslosenrecht und Sozialhilferech*t, 2013 (6), p. 243 (251).

[39] This court has classified *Grundsicherung für Arbeitsuchende* not as social assistance and therefore regard the provision as not in accordance with EU law: Landessozialgericht Baden-Württemberg, 25 August 2010, L 7 AS 3769/10 ER-B; This court argues that *Grundsicherung für Arbeitsuchende* is only social assistance so that this provision is

Therefore, new legislation or a judgment of a higher court is needed to clarify the situation.

Conflict with REG 883/2004
The regulation aims to coordinate the social security systems of the member states and contains a non-discrimination clause in article 4:

> Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

This again can be seen as *lex specialis* with regard to the antidiscrimination articles of the TFEU (Article 18 in conjunction with Article 21 TFEU).

Although benefits that are regulated in *SGB II* are stated as being special non-contributory cash benefits in Annex X of REG 883, it is still debatable whether Article 4 REG 883/2004 must be applied to *Grundsicherung für Arbeitsuchende* benefits.[40] Firstly, the personal and material scope of the regulation itself is not yet sufficiently clear; [41] the mere citation in Annex X is not sufficient.[42] There is also a requirement stating that the benefit should be tax financed (which is the case here) and that the benefit should provide 'additional supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3 (1) (REG 883/2004)' (Article 70(2) REG 883/2004). In relation to the third requirement whether *Grundsicherung für Arbeitsuchende* is a substitute for unemployment benefits and subsequently *really* is a special non-contributory cash benefit is a controversial issue. Again the special character of this benefit that focuses on integration in the labour market while also guaranteeing a subsistence minimum creates difficulties when it comes to classification.

And furthermore, it must be examined whether article 4 REG 883/2004 is applicable for *special non-contributory cash benefits* that are listed in Annex X of the regulation.

The *Bundessozialgericht* has not answered the question of whether Section 7(1) 1 s 2 is in accordance with REG 883/2004 in its decision of 30 January 2013,[43] and, in this respect, several courts are in doubt about the conformity with EU law and have addressed this issue in their decisions but often

in accordance with EU law: Landessozialgericht Niedersachsen-Bremen, 26 February 2010, L 15 AS 30/10 B ER.

40 For further information see: Kötter 2013, p. 243 (p. 248 et seq).

41 For further details please see: Kingreen 2013, p. 132 (p. 134 et seq); Kötter 2013, p. 243 (p. 247 et seq), Schreiber 2012, p. 647 (p. 648 et seq).

42 Some courts and authors see the reference of the benefit in Annex 10 as a constitutive condition.

43 Bundessozialgericht, 30 January 2013, B 4 AS 54/12 R.

without formulating a final opinion.[44]
However, even if the non-discrimination rule of the regulation must be applied for *Grundsicherung für Arbeitsuchende* the situation remains unclear due to the grounds for justification stated above provided in Article 24 DIR 38/2004.

DIR 38/2004 specifically allows the exclusion from social assistance of economically non-active EU citizens. This could be taken as permission to discriminate against EU citizens in special cases.

The relationship between a regulation and a directive is not explicitly regulated in the EU treaties and gives impetus to another very dogmatic legal debate. Some authors support the point of view that a regulation should prevail in these cases, arguing that a regulation has a more binding character. [45] Others believe that a directive is also binding for the member states[46] and what is more in this case it could be seen as being the more specific rule (*lex specialis derogat legi generali*) because the national legislator has used the room to manoeuvre offered to create an customised provision.[47]

Although this article will at this point not provide a dogmatic profound answer to the debate about the legal conformity with EU law regarding the exclusionary provision of the *SGB II*, it should have made clear that the non-discrimination rules that can be found in the REG 883/2004 and the DIR 38/2004, due to the binding characters of these legal instruments, cause serious doubts about the conformity of the German provision with EU law.

Conflict with Article 1 of the European Convention of Social and Medical Assistance
Not only does secondary law of the EU given rise to this academic discussion but the European Convention on Social and Medical Assistance supplies added ammunition in favour of doubts concerning the validity of the exclusion.[48]

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44 These courts argue against the accordance of Section 7(1) s 2 with REG 38/2004: Landessozialgericht Bayern, 19 June 2013, L 16 AS 847/12; Sozialgericht Dresden, 05 August 2011, S 36 AS 3461/11 ER; Hessisches Landessozialgericht, 14 July 2011, L 7 AS 107/11 B ER. These courts have doubts concerning the accordance but have not clearly answered the question: Landessozialgericht Niedersachsen-Bremen, 11 August 2011, L 15 AS 188/11 B ER; Landessozialgericht Baden-Württemberg, 24 October 2011, L 12 AS 3938/11; Landessozialgericht Sachsen-Anhalt, 14 November 2011, L 5 AS 406/11 B ER; Landessozialgericht Berlin-Brandenburg, 25 June 2012, L 14 A5 1160/12 B ER.

45 D. Frings, 'Grundsicherungsleistungen für EU-Bürger unter dem Einfluss der VO (EG) Nr. 2004/883', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 2012 (9), p. 317 (318).

46 Kingreen 2013, p. 132 (p. 136 et seq).

47 Kötter 2013, p. 243 (p. 251).

48 Convention from 11 December 1953, Bundesgesetzblatt Teil II, no 15 - 1956, p. 564.

Germany was among the 17 signature states[49] of the European Convention on Social and Medical Assistance in 1953 that was initiated by the Council of Europe.

Article 1 ECSMA states that:

> nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally (...) (as) own nationals and on the same conditions to social and medical assistance.

The convention was almost unknown in the academic world until the *Bundessozialgericht* found in 2010 that the duty to provide social assistance under the same requirements as for nationals which results from the ECSMA prevails over the exclusion of Section 7(1) s 2 SGB II.[50] The German government promptly declared benefits granted under the two social benefit schemes, those based on *SGB II* and those based on *SGB XII*, to be legal provisions falling within the scope of the ECSMA, but not without making use of the possibility to restrict eligibility for specific benefits provided for in Article 16 (b) ECSMA. Based on this, Germany declared there is no obligation to grant *Grundsicherung für Arbeitsuchende* to nationals of other contracting states whereupon the public authorities saw reason to exclude those EU citizens to whom either of the exclusions could be applied.

There are good reasons for the presumption that the declaration of the German government is contrary to international law.[51] Firstly, the scope of application of the ECSMA would be limited to such an extent that the conclusion could be drawn that this limitation would be against the general purpose of the treaty. Secondly, the wording of Article 16 (b) ECSMA is a 'new law or regulation' and it could be questioned whether *Grundsicherung für Arbeitsuchende*, which was introduced in 2005, can be considered as a 'new law or regulation' in terms of the ECSMA, which was adopted in 1956.

As long as there is no case-law of the *Bundessozialgericht* or from the ECJ, there cannot be a guarantee for nationals of the contracting states that public authorities will grant them social assistance benefits on the basis of the ECSMA provisions, albeit some courts of appeal have decided that nationals from the contracting states are entitled to receive such benefits.[52]

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49 Rumania and Bulgaria and some other European Countries are still no signatory states.

50 Bundessozialgericht, 19 October 2010, B 14 AS 23/10 R.

51 E. Steffen & S. Keßler, 'Pacta sunt servanda - Ist der deutsche Vorbehalt zum Europäischen Fürsorgeabkommen wirksam?', *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 2012 (7), p. 245.

52 Courts granting benefits on basis of the ECSMA: Landessozialgericht Berlin-Brandenburg, 25 June 2013, L 20 AS 1347/13 B ER; 09 May 2012, L 19 AS 794/12 B ER; 23 May 2012, L 25 AS 837/12 B ER; 15 August 2012, L 19 AS 1851/12 B ER; Other courts

Since there is no high court judgment yet, German court decisions, again, are quite divergent.

2.5 Entitlement to Sozialhilfe for EU citizens

Beside the social assistance scheme for able-bodied persons of *Grundsicherung für Arbeitsuchende*, another general scheme exists in Germany called *Sozialhilfe*. Provisions about this scheme can be found in the 12th book of the *Sozialgesetzbuch*. A person can rely on this social assistance basically in all cases when no other social safety net can cushion their situation of need. It consists of (Article 8 SGB XII):

- Subsistence benefits
- Basic income support for elderly and for people with reduced working capacity
- Assistance in cases of illness, including assistance during pregnancy and motherhood
- Social reintegration of disabled people
- Assistance for care
- Assistance in special circumstances

In principle, all of these benefits are granted to foreign nationals under the same conditions as they are granted to German nationals. But there are exceptions to this principle.

Sozialhilfe, as mentioned earlier, works as a social security safety net and thus cushions all cases that fall outside the scope of other social assistance schemes. Consequently, persons who *in principle* have a claim to *Grundsicherung für Arbeitsuchende* are not able to successfully claim *Sozialhilfe* and will be asked to claim benefits from the scheme which is intended to cover this group of persons (Section 21 SGB XII).

However, the above mentioned uncertainties regarding the exclusionary provisions of the *SGB II* also have an impact on the legal structure concerning the relationship between *Grundsicherung für Arbeitsuchende* (*SGB II*) and *Sozialhilfe* (*SGB XII*). Section 21 SGB XII states that nobody should be entitled to *Sozialhilfe* if they are *in principle* entitled to *Grundsicherung für Arbeitsuchende*. Although *Sozialhilfe* is not constructed to provide benefits for able-bodied persons, some appeal courts entitled EU citizens to benefits of this scheme after *Grundsicherung für Arbeitsuchende* was denied to them.

have serious doubts concerning the position of the German government but have not answered the question finally: Landessozialgericht Berlin-Brandenburg, 28 June 2012, L 14 AS 933/12 B ER; Landessozialgericht Rheinland-Pfalz, 21 August 2012, L 3 AS 250/12 B ER; Landessozialgericht Bayern, 14 August 2012 , L 16 AS 568/12 B ER; Landessozialgericht Nordrhein-Westfalen, 15 November 2012, L 7 AS 1708/12 B ER.

The German legislator clearly had it in mind to exclude EU citizens from this scheme as well,[53] but the courts have questioned the validity of this second exclusion because it is seen that with the explicit exclusion in Section 7(1) s 2 SGB II, the applicant is no longer *in principle* entitled to *Grundsicherung für Arbeitsuchende* and therefore is able to claim *Sozialhilfe,* or because at least *Sozialhilfe* must be granted due to the obligation that follows from the ECSMA.[54] With these court decisions that claim to interpret the relevant provisions in the light of EU law, the exclusion of *Sozialhilfe* for job-seekers that is also found in Section 23(3) SGB XII is bypassed.

Evidently, here again a discrepancy between the explicit intent of the legislator and the legal situation as seen by some courts becomes obvious.

Therefore, it is unfortunately also impossible to draw a completely clear and definite picture of the legal situation with regard to this in Germany.

However, if EU citizens are entitled to receive *Sozialhilfe* (and due to very good arguments, most of the courts hold this view), an instrument to limit the extent of this social assistance is contained in Section 23(3) SGB XII, which has a provision for the exclusion of foreign nationals 'who entered the country to gain Sozialhilfe.'[55]

This provision allows the exclusion of those EU citizens who explicitly wanted to immigrate only for the purpose of receiving social assistance. This purpose must be the dominant motivation for entering Germany and the onus of proof lies with the public authority.[56] But again the German authorities are able to assess whether the conditions for a right of residence are still met and if not they can withdraw that right and subsequently the person can only receive benefits for basic needs on the basis of the *Asylbewerberleistungsgesetz* (AsylbLG) and is obliged to leave the country.

2.6 Discretionary benefits

However, even if all claims for *Grundsicherung für Arbeitsuchende* and *Sozialhilfe* are rejected on the basis of these controversial provisions, Section 23(1) s 3 SGB XII opens the possibility and duty for public authorities to grant *Sozialhilfe* in situations where it is needed and justified. Subsequently,

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53 Bundestagsdrucksache 16/688, p. 13.

54 Landessozialgericht Nordrhein-Westfalen, 25 November 2013, L 19 AS 578/13 B ER; 29 June 2012 - L 19 AS 973/12 B ER; 02 October 2012, L 19 AS 1393/12 B ER, L 19 AS 1394/1; 27 June 2007, L 9 B 80/07 AS ER; 03 November 2006, L 20 B 248/06 AS ER; Landessozialgericht Berlin-Brandenburg, 28 June 2012, L 14 AS 933/12 B ER; Landessozialgericht Hamburg, 14 January 2013, L 4 AS 332/12 B ER; Landessozialgericht Niedersachsen-Bremen, 27 November 2008, L 8 SO 173/08 ER.

55 Section 23(3) SGB XII in German: 'Ausländer, die eingereist sind, um Sozialhilfe zu erlangen.'

56 Landessozialgericht Nordrhein-Westfalen, 27 June 2007, L 9 B 80/07 AS ER.

if a foreign national is heavily dependent on assistance (for instance where human dignity demands certain benefits), public authorities shall grant *Sozialhilfe* to the person concerned. Thus, for example foreign nationals who are obligated to leave the country (EU citizens who have lost their right of residence; undocumented migrants) can rely on supplies for basic needs.[57] The right to a minimum subsistence level of every individual is derived from Article 1, the right to human dignity, and Article 20 GG, the main principle of a social state, and therefore it is a state obligation to guarantee such a basic social security. A complete denial of benefits would not be in accordance with the German constitution.

Subsequently, even if grounds for exclusion apply, the competent authority is obliged to look at every individual case and find a discretionary decision that will, if necessary, grant the individual certain benefits. Other means such as the financing of the return journey to the home state are also possible, as long as they are reasonable.

2.7 Current developments

The elaborated analysis of the uncertain legal situation in Germany and the various argumentation lines should have made obvious a dissatisfying divergent application of highly delicate matters of social security.

Maybe it was only a question of time until a court case found its way to the *Bundessozialgericht* as the court of last instance.

Thus it was only in late November 2013 that a court case went to the *Bundessozialgericht* which in turn submitted the case to the ECJ where a decision must now be found concerning the exclusion from the social assistance.

The inferior court, the *Landessozialgericht Nordrhein-Westfalen*, had to rule on a case of a family from Romania with a child that had lived in Germany since 2009 that financed its costs of livelihood at first by selling street newspapers and receiving child benefit. The *Jobcentre* refused the application for *Grundsicherung für Arbeitsuchende* with reference to the legal exclusion contained in Section 7(2) s 2 SGB II.[58]

The decision of the *Landessozialgericht* was based on the non-discrimination rule of Article 4 REG 883/2004 that should be applied for benefits of the kind of *Grundsicherung für Arbeitsuchende*, so that the exclusionary provision in the German social code is incompatible with this requirement. The possible measures of a state to prevent social-benefits tourism which are allowed

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[57] Landessozialgericht Nordrhein-Westfalen, 27 June 2007, L 9 B 80/07 AS ER.

[58] Landessozialgericht Nordrhein-Westfalen, 28 November 2013, L 6 AS 130/13. Press release accessible available online: <www.lsg.nrw.de/behoerde/presse/archiv/Jahr_2013/Hartz-IV_Anspruch_auch_fuer_EU-Buerger_aus_Rumaenien/index.php>, last accessed on 14 January 2014.

according to DIR 38/2004 must not have an unconditional and extensive character, yet this is exactly what can be found in the provision concerned in the German social code. The possibility of an individual test and granting of support in certain circumstances must be guaranteed by the law.

The *Bundessozialgericht* has initiated a proceeding for a preliminary ruling before the ECJ that now has to answer three questions:

1. Does the non-discrimination rule of Article 4 REG 883/2004 apply to *Grundsicherung für Arbeitsuchende*?
2. Is a restriction of this principle of non-discrimination possible with regard to the justification ground that can be found in Article 24(2) DIR 23/2004, and if so, to what extent?
3. Is an exclusion of a benefit that on the one hand guarantees a minimum subsistence level but on the other hand facilitates the access to the labour market in accordance with Article 45(2) TFEU in conjunction with Article 18 TFEU?[59]

But this is only the most recent development. In summer 2013 the *Sozialgericht Leipzig* already initiated a preliminary proceeding before the ECJ (Article 267 TFEU) on this issue.[60] In this case a Romanian women and her child applied for *Grundsicherung für Arbeitsuchende* but the *Bundesagentur für Arbeit* denied this twice.

The court filed two other questions, giving the ECJ a total of 5 questions to answer:

4. Is an exclusion that tries to avoid an unreasonable burden of the social system contrary to the non-discrimination rule of Article 4 REG 883/2004?
5. If according to the answers of the first questions the partial exclusion of social assistance is in accordance with EU law:
   Can the tax financed benefit be limited to the costs of the return of the concerned person or does Article 1, 20 and 51 of the Charter of Fundamental Rights of the EU require further benefits that enable the person to stay permanently?

For this earlier proceeding the commission has only recently pronounced an opinion: the commission argues that the provisions on *Grundsicherung für Arbeitsuchende* do fall within the scope of REG 883/2004 and that

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[59] Bundessozialgericht, 12 December 2013, B 4 AS 9/13 R. available online: <//juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=ps&Datum=2013&nr=13224&pos=0&anz=35 >, last accessed on 14 January 2014.

[60] Sozialgericht Leipzig, case handed in on 19 June 2013, C-333/13.

subsequently the exclusion contained in the *SGB II* is not in accordance with EU law.[61]

Thanks to these court proceedings, the ECJ is now forced to decide on this legal issue and this gives rise to the hope that at least after the judgment of the ECJ a consistent legal application will follow that suffices the principle of clarity and definiteness.

Presumably, at least a new regulation must be found that allows an individual test which could end up with *Grundsicherung für Arbeitsuchende* being granted to the concerned EU citizen.

3 Entitlement to *Kindergeld*

Nationals from another EU member state or a member state of the European Economic Area are entitled to receive *Kindergeld* (child benefits) under the same conditions as German nationals from birth to the age of 18 years (Section 17 *Bundeskindergeldgesetz*). After the age of 18, the child in respect of whom *Kindergeld* is claimed should be enrolled in an educational institution. If this condition is fulfilled the benefit continues until the age of 25. Periods of time during which a child served in military or civilian service and is thus not entitled for this benefit are added to this age limit. Furthermore, usually it will be requested that the child has its domicile in Germany.

The benefit amounts to a monthly payment of up to EUR 184 per child for the first two children, EUR 190 for the third child and EUR 215 for every further child.

4 Conclusion

The German attitude towards the free movement of EU citizens seems to be ambiguous. EU law provides workers, self-employed persons and job-seekers with a (rather strong) right of residence that remains until it is withdrawn and due to the skill shortages in Germany, they are usually warmly welcome, but when it comes to social assistance, only economically active groups can rely on completely equal treatment. It seems that the debate about *good* or *bad* migration from EU member states will continue for some time. That the discussion is on the mind of German nationals could only be seen recently when 'social-benefits tourism' was elected by a committee as buzz (non-) word of the year 2013 (*Unwort des Jahres*).

The extensive social system in Germany with its two general social assistance schemes creates a regime of regulations that is far from

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[61] European Commission, proceeding C-333/13, document no. 9, Registration no. 945422, reference DC17589, available online: <mediendienst-integration.de/fileadmin/Dateien/ Empfehlung_Europ_Kommission_Sozialleistungen_GER.pdf>, last accessed on 14 January 2014.

uncomplicated. The debate about the entitlement condition of *earning capacity* for EU citizens with a limited access to the labour market should be clear thanks to new legislation and accordant court decisions and the requirement of a *habitual residence* should also be satisfiable if the *Bundesagentur für Arbeit* carefully tests specified evidence for factual residence.

Serious problems will emerge for job-seekers if their right of residence is derived solely from their searching for a job and they apply for social assistance because they do not have sufficient means. In these cases Section 7(1) s 2 SGB II imposes (social assistance) barriers to job-seekers. This also applies to EU citizens within the first three month of their stay. At this moment, the exclusion will be applied by public authorities albeit there are good chances for EU nationals to gain such benefits in temporary injunction proceedings. The main problem that becomes obvious from the legal discussion is the unclassified character of *Grundsicherung für Arbeitsuchende* that leads to questions of whether it can be excluded as *social assistance* on the basis of Article 24(2) DIR 38/2004 and whether the non-discrimination rule of Regulation 883/2004 must be applied. These two conflicts together with the uncertainty concerning the ECSMA increase the probability that in the near future either new legislation or more presumably a high court decision will lay a foundation for a different approach to job-seekers from an EU member state. It is now the responsibility of the ECJ to answer these burning questions.

As long as job-seekers' entitlement to *Grundischerung für Arbeitsuchende* remains unsettled, two possibilities are open to for EU citizens in need:

If possible they should convince the public authorities that their right of residence is not solely derived from their searching for a job, either because the fact that they have already worked or some other reason such as family reunification was decisive for their immigration. The second option is to apply for *Sozialhilfe* after being denied access to the *Grundsicherung* scheme. Although again exclusionary rules can be found, the chances that public authorities will grant benefits at their discretion are considerably higher and often courts will overturn the exclusion regime of the social assistance system. Furthermore, the fundamental requirement to enable every human to live a life in human dignity will lead to at least some kind of benefits for EU citizens in need.

However, the number of legal debates about the conformity of the exclusionary rules of the German social code with higher-ranking law reveals a conflict that goes beyond mere legal issues. Governments such as that of Germany as well as parts of the population fear that the 'ever closer Union'[62] necessarily goes hand in hand with a loss of competence and more importantly, a loss of wealth. However, they cannot ignore the facts of (European) life and especially existing treaties, rules and judgments

[62] Sentence two of the preamble of the TFEU.

which lead to a certain path dependency. Instead of trying to keep up existing barriers that are predestined to fall in times in which it is no secret that 'financial solidarity with nationals from other member states'[63] is required, governments and citizens should put their effort into improving the situation - for Germans and foreign nationals, workers and job-seekers. Maybe one day European citizens will experience the situation that 'civil solidarity that has been limited to the nation-state until now (...) expand (s) to include all citizens of the union, so that, for example, Swedes and Portuguese are willing to take responsibility for one another.'[64]

[63] ECJ 20 September 2001, C-184/99 (Grzelczyk), para 44 et seq.

[64] J. Habermas, *The Postnational Constellation,* Cambridge (Massachusetts): MIT Press 2001, p. 99.

Chapter 10
Swiss social assistance for foreign nationals

Delphine Poussin

1 Introduction

Even though the social security system is well developed in Switzerland, there is still poverty, especially amongst migrant populations. A poverty study conducted in 1992 showed that there are inequalities between Swiss nationals and foreign nationals. In fact, 5.6% of the population lives below the poverty line but only 5% of these are Swiss nationals compared to 7.9% foreign nationals.[1] According to Flückiger, young people from migrant families often have a lower level of education, which puts them at a higher risk of needing social assistance.[2] Unfortunately, there is no definite and uniform poverty line.[3] In a developed country such as Switzerland absolute poverty - as a battle for survival - is not the problem. In this country poverty should be understood in relation to the general standard of life of the population where social context has an important role.[4] However, for the migrant population such as the Roma, poverty can be understood in the absolute sense.

The Roma are the largest minority in Europe.[5] Since the European Union (EU) eastern enlargement in 2004, the European newspapers are constantly writing about this minority. However, due to the numerous stereotypes existing about this population no one really knows the true Roma. As a result of the agreement on the free movement of persons and the two protocols (I and II) concluded between Switzerland and the EU, Swiss people have also begun to show an interest in this matter. Especially since the two protocols were concluded with a view to the gradual inclusion of new EU states such as Romania in this free area. It should be noted that the right of free movement is accompanied by the mutual recognition of professional qualifications, the

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1 J-P. Tabin, Les paradoxes de l'intégration, Essaie sur le rôle de la non-intégration des étrangers pour l'intégration de la société nationale, Lausanne, Editions EESP 1999, p. 191.

2 C. Kunz, 'Entretien avec le professeur Yves Flückiger', *Caritas Genève Le journal*, 2010 (468), March 2010, p. 6.

3 Conférence suisse des institutions d'action sociale, Pauvreté et seuil de pauvreté, 2013, at <www.skos.ch/fr/?page=positionen/>, last accessed on the 28 December 2013, p. 2.

4 *Ibid*.

5 J-P. Liégeois, 'Les Roms au coeur de l'Europe', *Le Courrier des pays de l'Est*, 2005, No. 1052 (June), p. 19.

right to buy property and the coordination of social security systems.[6]

This chapter will focus on the Swiss general assistance schemes and not on family allowances or social security insurance, which are also part of the Swiss social security system.

Because of the massive migration existing in Switzerland it should be understood how foreign nationals are covered by this scheme, especially the Roma in Geneva.

This chapter will first explain the social assistance scheme in Switzerland. Subsequently, it will address the place that foreign nationals have in this scheme, particularly in Geneva. Geneva is not only a canton (federative state which includes different communes) but also a commune (Geneva city) and these two judicial entities will be analysed. The second part will focus on the situation of the Roma in Geneva. Finally, the third part will analyse the Geneva legislation on begging in the canton.

2 Swiss social assistance and foreign nationals

The Swiss social security system is divided into two schemes: social insurance and social assistance. This section will explain the social assistance schemes in Switzerland and the status given to immigrants under these schemes. They are important. In 2012, 250,333 persons received social assistance benefits, of which 20,079 did not have Swiss nationality.[7]

In Switzerland, social assistance is 'intended to provide cash support to those otherwise unable to support themselves and to provide services that will assist claimants back into a position where they can support themselves without public subsidies.'[8] It is the last thread in the Swiss social security system and thus subsidiary to the social insurance scheme. The whole system of assistance is based on the principle of guaranteeing the right to a minimum subsistence. This fundamental right is constitutional and although not mentioned in the Federal Constitution (Cst), has constitutional value. Acknowledged by the Tribunal Fédéral (Federal Tribunal, TF), in 1995, this right is defined as the right to a minimum subsistence, (food, clothes, housing, health) in conformity with human dignity.[9] It is important to note

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6 Federal Office for Migration (FOM), 'Free Movement of Persons Switzerland - EU/EFTA', 2013, at <www.bfm.admin.ch/content/bfm/en/home/themen/fza_schweiz-eu-efta.html>, last accessed on the 28 December 2013.

7 Office fédéral de la statistique, Dossiers de l'aide sociale, bénéficiaires de l'aide sociale et taux d'aide sociale par canton, en 2012, and Dossiers de l'aide sociale, bénéficiaires de l'aide sociale dans le domaine de l'asile par canton, au 30 juin 2012 (valeurs extrapolées), 20122012, both available at <www.bfs.admin.ch/bfs/portal/fr/index/themen/13/03/03/key/02.html> last accessed on the 28 December 2013.

8 OECD, Social Assistance in Canada and Switzerland, The Battle against Exclusion, Volume 3, Paris: OECD 1999, p. 157.

9 Tribunal Fédéral, 27 October 1995, 'Urteil der II. öffentlichrechtlichen Abteilung

that social assistance is based on the finality principle, which means that the cause of the distress of the person is not important. It is only the existence of the need that matters and this is assessed by the competent organ.

2.1 History

Social assistance in Switzerland has a long history with constant reforms usually being introduced following a crisis. The Swiss social security system developed slowly because of the federal structure. However, according to some authors, the political structure of Switzerland has also promoted some innovations in the local and cantonal plan.[10] Moreover, social assistance is the symbol of national solidarity.

Since the start of the 18th century, the obligation to provide assistance has been concentrated in the communes and the business of the bourgeoisie. The communes created a list of indigent people and some poor grants were organised. The help provided to indigent people in this period was not a tax, but a mandatory charity. In other words, there was a duty to provide charity.[11] According to Tabin, in this period there was no systematic segregation, as there was in France, according to nationality, the dominant notion being 'the foreigner from the communes or the city'.[12] Generally, the commune of origin was used as a basis.

National assistance legislation was introduced in Switzerland at the end of the 19th century.[13] This period was crucial for determining the personal scope of application. There were many debates on this matter and the main question was whether all the people living in the canton should be helped or only those that originate from the canton?[14] Depending on the cantons, which have the competency, it was one or the other solution which was chosen. A partial solution was found in 1937 with the inter-cantonal convention on assistance to the domicile.

The modification of the Constitution in 1974 made important contributions in the domain of social assistance. First, the new Article 45

vom 27. Oktober 1995 i.S. V. gegen Einwohnergemeinde X. und Regierungsrat des Kantons Bern (staatsrechtliche Beschwerde)', ATF 121 I 367, at <www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>.

10 F. Bertozzi & G. Bonoli, 'Fédéralisme et protection sociale en Suisse: entre immobilisme et innovation', *Sociétés contemporaines*, 2003, 51 (March), p. 13.

11 Tabin 1999, p. 171.

12 Ibid.

13 J-P. Tabin, A. Frauenfelder, C. Togni & V. Keller, 'Temps d'assistance. Le gouvernement des pauvres en Suisse romande depuis la fin du XIXe siècle', *Editions Antipodes*, 2008, at <www.antipodes.ch/existences-et-societe/101-temps-dassistance>, last accessed on the 29 December 2013.

14 *Ibid*.

of the old constitution (aCst) provides a right for all Swiss citizens to settle in the Confederation. Secondly, Article 48 aCst states that the assistance of persons in need falls to the cantons of domicile. Also, the Conseil Fédéral (Federal Council) adopted the Social Assistance Law in 1977, which regulates competency in this matter and contains some material provisions (concept of assistance, definition of person in need). The canton of origin is no longer always competent since the revision of this Federal law in 1990 gave competency to the canton of stay in the absence of a domicile.

Since 1990 Switzerland, like others countries in Europe, has a demographic problem. In fact, the population is getting older leading to financial difficulties in the social security system.[15] This phenomenon explains the debates on poverty and some revisions of the different social laws. The most important action with regard to social assistance is the inscription in the Federal Constitution of the fundamental and absolute right to obtain help when in a state of distress (art 12 Cst). This action was taken through the revision of the Constitution in 1999.[16]

2.2 ources and competent organs

The legal basis for social assistance is Article 12 Cst, which provides for an absolute right to receive help when in a state of distress. This article explains that anyone in a state of distress, who is unable to maintain him or herself, has the right to receive help and the necessary means to enable him or her to live a dignified life. This article does not provide for a direct right to a benefit and concerns only the person who is unable to meet his family's needs. According to the case 'i.S. X. gegen Departement des Innern sowie Verwaltungsgericht des Kantons Solothurn' Article 12 Cst also applies to foreign nationals.[17] The cantons are the competent entities in this domain and have to assist the person in need (Article 115 Cst). The Confederation only has the responsibility to regulate the exceptions.[18] Another essential source in the matter of assistance is federal law: 'Loi fédérale du 24 juin 1977 sur la compétence en matière d'assistance des personnes dans le besoin' (LAS), which contains fundamental principles and has to be applied by the cantons.

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[15] F. Bertozzi, G. Bonoli & B. Gay-des Combes, 'La réforme de l'état social en Suisse : Vieillissement, emploi, conflit travail-famille, Lausanne, First Edition', *Presses polytechniques et universitaires romandes*, 2005, p. 11.

[16] AvenirSocial, *Programmes d'intégration dans l'aide sociale: Position d'AvenirSocial,* 2012, at <www.avenirsocial.ch/fr/p42010894.html>, last accessed on the 4 May 2013, p. 2.

[17] Tribunal Fédéral, 18 March 2005, 'Auszug aus dem Urteil der II. öffentlichrechtlichen Abteilung i.S. X. gegen Departement des Innern sowie Verwaltungsgericht des Kantons Solothurn (Staatsrechtliche Beschwerde)', ATF 131 I 166, at <www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>, par. 3.1.

[18] Art 115 Cst.

The federative states usually delegate their competency to the communes. The last source for social assistance is cantonal law, which all cantons usually have, such as the 'Loi sur l'insertion et l'aide sociale individuelle' (LIASI) in Geneva. This law is completed by way of an executive agreement. All the important matters are addressed, such as the personal scope of application, the benefit conditions and employability measures. Indeed the LIASI has recently been reformed in 2012 and, for example, for employability measures a new paragraph is inserted in this law. The objective of this cantonal law is to guarantee those in need (material and moral distress) conditions of life in conformity with human dignity and to help them to be reinserted in their social and work life.[19]

With a view to creating a coordinated and an equal social system throughout the country, the 'Conférence suisse des institutions d'action sociale'[20] (CSIAS), a professional private association, drafts recommendations for the government and the public or private institutions.[21] Even if these are not mandatory, they are admitted and the majority of the cantons use these recommendations in their legislation.[22] Furthermore, there is a federal law that provides for assistance for the Swiss citizens living abroad: 'Loi fédérale sur l'aide sociale et les prêts alloués aux ressortissants suisses à l'étranger' (LAPE), but this law is not important in the case of foreign nationals in Switzerland.

Switzerland's international relations concerning social security are regulated via bilateral and multilateral agreements, with social assistance being the subject of specific conventions.[23] These conventions are important in matters of immigration because these are also the sources that provide some obligations to provide assistance to foreign nationals staying in Switzerland.

In Geneva (as a canton), the 'Direction Générale de l'Action Sociale'[24] (DGAS) is charged with applying federal legislation and adapting cantonal legislation regulating social benefits granted to persons temporarily or to asylum-seekers. The 'Hospice Général',[25] the executive organ of the LIASI, is

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19 République et Canton de Genève, Direction Générale de l'Action sociale (DGAS) - Prestations: Politique cantonale en matière d'aide sociale, at <www.ge.ch/dgas/prestations-politique-cantonale-aide-sociale.asp>, last accessed on the 29 December 2013.

20 Swiss Conference of the institutions for social action.

21 ARITAS, *Aide sociale*, 2013, at <www.guidesocial.ch/fr/fiche/751/#som_144208>, last accessed on the 29 December 2013.

22 Conférence suisse des institutions d'action sociale, Questions fréquentes au sujet de l'aide sociale, 2013, at <www.skos.ch/store/pdf_f/publikationen/grundlagendokumente/ FAQ_2013-f.pdf>, last accessed on the 29 December 2013, p. 2.

23 Tabin 1999, p. 135.

24 General Direction of Social Action.

25 General Hospice.

in charge of monitoring the files of these persons and provides emergency help to refugees who have been denied asylum.[26] Moreover, there are many private organizations and associations operating in the area of welfare and these suggest financial benefits, integration programmes, advice and support for persons in need. Apart from the organizations acting in the whole Confederation, such as 'Caritas', 'Quart monde' and the 'Swiss Red-Cross', there are also some local associations, such as 'Carrefour-rue in Geneva'.

2.3 Personal and territorial scope of application, the situation of foreign nationals

The 'Office Fédéral de la Statistique'[27] (OFS) observes that foreign nationals are more likely to depend on social assistance than are Swiss nationals.[28] Swiss social assistance is universal which means that the national collectivity will have social rights in case of need. Most importantly, the award criterion depends on the quality as member of the national societies.[29] As we saw in section 2.1 of this chapter, this question has been debated for some time in Swiss politics. Moreover, in the case ATF 121 1 367 the TF stated that the foreign nationals can also invoke the constitutional and unwritten right to a minimum subsistence.[30]

As stated by Pieters, the first entitlement requirement in all social assistance schemes is that an individual 'will have to be needy or destitute in order to be able to claim assistance.'[31] In other words these schemes apply a means test. Article 2 LAS defines the person in need as a person unable to maintain her or himself in a sufficient manner or in a sufficient time by her or his own means.[32]

According to Articles 12 and 13 LAS to receive assistance the individual must be a Swiss citizen. Article 12 LAS states that the canton of domicile, being the canton where the person resides with the intention to settle, should

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[26] République et Canton de Genève, Direction Générale de l'Action sociale (DGAS), 'Prestations: Politique cantonale en matière d'aide sociale', at <www.ge.ch/dgas/prestations-politique-cantonale-aide-sociale.asp>, last accessed on the 29 December 2013.

[27] Federal Office of Statistics

[28] J-P. Tabin, *Qui a besoin de l'assistance publique?,* 2010, at <www.reiso.org/spip.php?article643>, last accessed on the 29 December 2013.

[29] Tabin 1999, p. 122.

[30] Tribunal Fédéral, 27 October 1995, 'Urteil der II. öffentlichrechtlichen Abteilung vom 27. Oktober 1995 i.S. V. gegen Einwohnergemeinde X. und Regierungsrat des Kantons Bern (staatsrechtliche Beschwerde)', ATF 121 I 367, at <www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>, par. 2c.

[31] D. Pieters, *Social Security: An introduction to the Basic Principles*, Alphen aan den Rijn: Kluwer Law 2006, p. 98.

[32] Art. 2 LAS.

provide the assistance and in the absence of a domicile, the canton of stay.[33] On the other hand, under Article 13 it is the canton of stay that is required to provide assistance in the event of emergency (when a Swiss citizen needs immediate help and is not in his canton of domicile). Furthermore, in Title 3 LAS, the LAS also provides foreign nationals with a right to assistance. Under Article 20 LAS, a foreign national who has a domicile in Switzerland would be assisted by the canton of domicile and Article 13 will apply by analogy if immediate assistance is needed. Article 21 LAS applies if the foreign national has no domicile in Switzerland but is just staying in the city. If this foreign national needs immediate help or assistance to go back in his or her domicile or country of origin, it is the canton of stay that has to provide this.

Every canton has its own provisions relating to the personal scope of application. In the canton of Geneva, Articles 11 (principles) and 12 (exceptional cases) LIASI regulate the personal scope of application. Article 11 states that to receive benefits a person must have a domicile or an effective residence in the canton of Geneva and must be unable to provide for his family's needs. This law does not apply for asylum seekers (refugees). There is a special federal law on asylum, which handles assistance for them (art 11(2) LIASI). Paragraph 4 of Article 11 LIASI provides for some special benefits for specific groups of persons, including foreign nationals without authorization to stay, persons in transit and persons guaranteed assistance under Agreement on the free movement of persons concluded with the EU. Article 11(3) states, in derogation from 11(2) that individuals provisionally allowed to stay in Switzerland qualify for a benefit provided under paragraph IV of section III LIASI, provided they fulfil two cumulative conditions. The first is that this individual has exhausted his or her right to unemployment benefit. The second condition is that the individual has had a domicile in Geneva or an effective residence in this city without interruption for seven years prior to the application. Article 12 LIASI provides for some special cases such as benefits paid to persons in institutions or the owner of real estate property.

Where foreign nationals are concerned account should also be taken of the bilateral and multilateral agreements that Switzerland has concluded with others countries. These provide for a right to assistance for several categories of immigrants residing in Switzerland. In the case of the Roma, who come from Romania, this is the free movement of persons convention concluded with the EU and extended in 2009 to include Romania. This agreement contains some restrictions until 2016 for Bulgaria and Romania. The directive on the progressive introduction of free movement provides that all immigrants from the EU are entitled to all social benefits including social assistance.

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[33] Art. 12(2) LAS.

The Swiss assistance scheme states that Swiss citizens who move abroad fall within the scope of application of the LAPE.[34]

To conclude, the Swiss and the Geneva social assistance schemes are broad, providing for a right to social assistance not only for Swiss citizens but also for foreign nationals subject to specific conditions.

3 The situation of the Roma in Geneva

The majority of the Roma begging in Geneva come from Romania with 70% originating from the Alba region.[35] According to the Mesemrom Association the situation in their country is not how it is depicted abroad - life is precarious.[36] This part of the chapter explains the history of the Roma and their situation after migrating to Geneva.

3.1 Who are the Roma and what are their reasons for migrating to other European countries

'The Roma, who today constitute a mosaic of diverse groups (Roma, Sinté, Kalé and Gypsies), first arrived in Central Eastern Europe from India at the end of the 13th century'.[37] In Romani their name means 'man of the Roma ethnic group' or 'husband'.[38] They speak Romani; an Indo-European language. The Roma have never had a state and as a result they are a minority in many countries. 'There are about 10 million Roma in Europe; and the two countries with the highest Romani minority are Romania and Bulgaria.'[39] The Roma's identity is not based on a national state or a nationality but on specific language, culture and traditions.[40]

The Roma do not migrate because of a nomadic culture but because of the political and economic context in their country. Before the fall of the totalitarian states in Central and Eastern Europe, 95% of the Roma's population were workers or farmers.[41] When the states collapsed, industry

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34 Art. 2 LAPE.

35 Mesemrom association, *Regard sur les Roms*, at <www.mesemrom.org/infos.html>, last accessed on 3 January 2014, p. 1.

36 *Ibid*.

37 Council of Europe, *Defending Roma : human rights in Europe*, at <www.coe.int/romatravellers>, last accessed on 5 May 2013, p. 2.

38 Council of Europe, *Roma and Travellers Glossary,* 2006, at <www.coe.int/t/dg3/romatravellers/Source/…/GlossaryRoma.doc>, last accessed on 3 January 2014, p. 3.

39 Council of Europe, *Who are the Roma*, at <www.dosta.org/node/34>, last accessed on 6 May 2013.

40 Rroma Foundation, *The Rroma*, 2008, at <www.rroma.org/>, last accessed on 3 January 2014, p. 12.

41 Mesemrom association, *Que savons-nous des roms?, une campagne de Mesemrom*, at <www.mesemrom.org/projets_campagne.html>, last accessed on the 3 January 2014.

ground to a halt and poverty increased significantly. According to Mesemrom Association, the political and economic transition in Eastern Europe is the reason why so many Roma are begging on Europe's streets today.[42] The fact that the migration statistics for the Roma are not significantly higher than those for other Romanian nationals confirms this observation. The Roma Foundation adds that racism and persecution in their home country are another reason for this group to migrate.[43] Indeed, the Roma were and still are persecuted. There was no place for them in a state defined by ethnicity and they have been the object of ethnic cleansing. Even though today the situation of this minority has improved because of their official recognition in the Romanian Constitution and the encouragement to freely develop its identity as a people[44] (since 1990, end of the regime of Ceausescu), they still suffer under discrimination and violence in Eastern Europe.

3.2 Roma in Geneva

The Roma has settled in all the Swiss cantons since the 15th century. Many Roma migrated after the Second World War. According to the Roma Foundation they are well-integrated (they speak the national language, have work and their children go to school).[45] In contrast, for the Roma who arrived after the collapse of the totalitarian states, conditions in Switzerland are difficult. They usually only have a temporarily permit for foreign nationals (F permit) or an asylum seekers permit (N permit). They live apart from the native population, are under-employed and poorly educated. Because of a lack of professional qualifications, they have trouble finding work to take care of their family.[46]

The majority of the persons begging in Geneva originate from Romania and entered the country legally. According to J-P Tabin they arrived by bus in small groups with nothing connecting them except their misery.[47] Most of them do not have a residence in Switzerland and have to live on the streets. We can qualify this population as homeless in line with the definition of the 'European Federation of National Organisations working with the Homelessi'[48] (FEANTSA) because most of them are without shelter of any kind and sleep rough.[49] Since the 17th century beggars have not been

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42 *Ibid*.

43 Rroma Foundation 2008, p. 16.

44 EUroma, *Romania - Main Page*, at <www.euromanet.eu/facts/ro/index.html>, last accessed on 3 January 2014.

45 Rroma Foundation 2008, p. 18.

46 *Ibid*, p. 17.

47 J-P. Tabin, *La mendicité*, 2012, at <www.reiso.org/spip.php?article2216>, last accessed on 3 January 2014.

48 European Federation of National Organisations working with the Homeless.

49 FEANTSA, *ETHOS Typology on Homelessness and Housing Exclusion*, 2006, at <www.feantsa.org/spip.php?article120>, last accessed on 3 January 2014.

appreciated in Switzerland and there have been many initiatives to combat begging. For example, during the 30 years war a hunt was organised to expel the beggars.

3.3 Anti-Roma measures

'Wherever they live, in old or new democracies, Roma are subjected to intolerance, prejudice and discrimination and their presence in Europe has been marked by centuries of persecution, slavery, extermination and assimilation policies'[50] Switzerland is, as are other European countries, influenced by the stereotypes of the Roma and many measures have been taken against them. These measures are taken due to the fear that the Roma were intent on invading the country, would commit crimes or take advantage of the welfare system. This section examines some recent measures that have been taken. Most of these measures are the result of the extension of the free movement of persons agreement to include Bulgaria and Romania.

Before the vote on extending the free movement of persons in 2009, there were heated political debates on the Roma and a populist campaign.[51] This campaign claimed that the new agreement would lead to two or three million Roma arriving in Switzerland asking for money and committing crimes.[52] This is not the case. In fact, since 2004 only about one hundred Roma have arrived in Geneva from Romania.[53]

Another measure taken against the Roma is the adoption of the Geneva law prohibiting begging. This issue is dealt with in the third section (paragraph 4).

In the winter of 2010, a new shelter was provided in Geneva for Roma children and their mothers. This shelter closed down three times because too few people made use of it.[54] Despite the fact that the facilities offered by this shelter were not used a right political party still claimed that giving the Roma a warm welcome and decent living conditions would attract more Roma to come Geneva from other Swiss cities.[55] In this period, the 'Conseil

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50 Council of Europe, *Defending Roma : human rights in Europe*, at <www.coe.int/romatravellers>, last accessed on 5 May 2013, p. 2.

51 Rroma Foundation, Déclar*ations racistes et préjugés dans le cadre de la campagne contre la libre-circulation*, at <www.rroma.org/information/site_blog/media-campaign/doku-61-f.pdf>, last accessed on 3 January 2014.

52 Rroma Foundation, *Déclarations racistes et préjugés dans le cadre de la campagne contre la libre-circulation,* at <www.rroma.org/information/site_blog/media-campaign/doku-61-f.pdf>, last accessed on 3 January 2014.

53 Mesemrom association, *Que savons-nous des roms?, une campagne de Mesemrom*, at <www.mesemrom.org/projets_campagne.html>, last accessed on 03 January 2014.

54 J-P. Tabin, Quel sort pour les Roms à Genève?, 2010, at <www.reiso.org/spip.php?article562>, last accessed on 3 January 2014, p. 1.

55 Tabin 2010b.

d'Etat'[56] of Geneva ordered that if the police suspects there are children being involved in begging they have to inform the child protection office, which office will then invoke the so called 'the peril clause'. This clause is a disposition which applies when the protection and security of a child is threatened. One of the possible consequences of this clause is that the state could take over the custody of the child. The morning after this order was given the police went to a shelter and brought three Roma children to the child protection office at 6.30 in the morning. They took the mother to the police station for questioning. She was released a day later and the children were entrusted to their aunt. The president and lawyer of the 'Mesemrom Association' did not consider this to be a social measure. They believed the authority simply wanted to take the children away from their parents. Indeed in this case there was no threat to life (reason to take custody away from the parents).[57]

3.4 The Roma and the social assistance in Geneva

This section will examine whether the Roma in Geneva could fall within the personal scope of application of the Swiss social assistance scheme and which entity should pay their benefits. While the Roma in general are considered in this section it is important to note that assistance is an individual benefit and entitlement will be assessed on a case-by-case basis. So this analyze is only theoretical. Because Switzerland is a Confederation, first federal law will be examined and then cantonal law.

As stated in section (paragraph 2), to receive a benefit an individual must be in need or destitute. In the case of the Roma, they do not have enough money to survive in their country so they travel to Switzerland or other European countries to find a work. It is not easy for the Roma to find work in Switzerland. According to many authors and associations, they are a population in need.[58] The Roma will usually fulfil the conditions of Article 2 LAS because there are unable to maintain themselves. The Roma do not have Swiss nationality and are thus considered to be foreign nationals meaning Articles 20 to 22 LAS will apply. The problem with applying theses articles is the question of domicile. Under Swiss law and according to the LAS, the domicile is defined as the place where the person resides with the intention to settle.[59] The problem with the Roma (who beg in Geneva for example) is that they come to Switzerland and stay in Geneva not with the intention to settle in this place but to win money and then go back to their country. So

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[56] State Council (government)

[57] Tabin 2010b.

[58] Lundi 5 Décembre 2011, 'Invitation aux médias - Conférence de Presse du 8 December 11, 2011' at <www.mesemrom.org/archives.html>, last accessed on 4 January 2014, p. 4.

[59] Art. 4 LAS.

it will be difficult to find a domicile in one of the Swiss cantons within the meaning of Article 4 and 20 LAS. However Article 21, which applies when foreign nationals do not have a domicile in Switzerland but stay in a Swiss city, could apply for the Roma. According to this article the canton of stay will provide assistance to a person in need or assist this person in returning to his or her country of origin. The Roma begging in Geneva are staying in the canton of Geneva because they have an effective presence in this canton within the meaning of Article 11 LAS. It is important to note that it is more a help to return in their country than a benefit. Thus, according to the LAS, the canton of Geneva has the competency concerning the assistance for the Roma staying in Geneva.

Under Geneva law, as we have seen, it is the LIASI that provides the specific legal basis for social assistance. Most of the Roma are not staying illegally in Switzerland. They fall within the scope of the agreement on the free movement of persons concluded between the EU and Switzerland.[60] The Roma have an effective presence in Geneva but not a domicile. The question is whether they have an effective residence in Geneva, which is a condition for the application of Article 11 LIASI. Neither the TF nor other Geneva tribunals have answered this question. Moreover, according to Article 11(4) LIASI, the 'Règlement d'exécution de la loi sur l'insertion et l'aide sociale' provides special assistance for persons insured under the Agreement on the free movement of persons concluded with the EU, such as the Roma. According to Article 15 which concerns these persons, an exceptional financial benefit could be granted to the person seeking work in Geneva. In my opinion, this provision could be used by the Roma. So far the TF has not ruled specifically on this. However, in its decision on the legality of the law prohibiting begging it states that social assistance as meant in Article 12 Cst can be claimed by foreign nationals.[61] Anyone who is in a distressing situation and who is not able to meet his/her needs has the right to social assistance. The TF has not yet made any other decisions relating to this issue.

4 The Geneva law prohibiting begging

It is not the Confederation that prohibits begging, this is regulated in cantonal laws. As a result begging is prohibited in some cantons while in others it is permitted. The debate on the prohibition of the begging in the canton

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60 Council of Europe: Commission des migrations, des réfugiés et des personnes déplacées, *La situation des Roms en Europe : circulation et migrations*, 2012, at <assembly.coe.int/extranet>, last accessed on 13 May 2013, p. 7.

61 Tribunal Fédéral, 09 May 2008, 'Extrait de l'arrêt de la Cour de droit pénal dans la cause X. et consorts contre Grand Conseil du canton de Genève (recours en matière de droit public)', ATF 134 I 214, at <www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>, para. 5.7.3.

of Geneva follows from the debate on the extension of the free movement of persons to include foreign nationals from Bulgaria and Romania. This agreement was finally extended by vote on 8 February 2009. This section explains the prohibition of begging in the canton of Geneva with reference to case 134 I 214 of the 9 May 2008.[62]

4.1 Begging

Begging could be defined as an individual asking for help (usually in the form of food or money) without payment.[63] A police report states that in 2007 there was 328 beggars in the canton of Geneva, which has a population of 447,584 persons, thus this is less than 0.1%.[64] The Roma are forced to beg for diverse reasons. In 2011, the Swiss government made use of the possibility to keep in place the restrictions against Bulgarian and Romanian nationals in relation to freedom of movement.[65] That means that access to the labour market for these nationals will continue to be restricted until May 2014. As a result it is very difficult for Romanian and Bulgarian nationals to find work in Switzerland, and in my opinion it must be even more difficult for the Roma due to the stereotypes people have about them. However this is not the only reasons the Roma beg. According to the Mesemrom Association, they are in a poor situation in their countries because of the fall of the totalitarian regime as explained in paragraph 3.1. It is hard for them to obtain social assistance in their own countries and even if they did receive a benefit this would not be enough to support them. This explains their decision to move to another state. Upon their arrival in Switzerland the only option for them was to beg because work was hard to find since most of them do not speak the language and have no qualifications. Furthermore, in Geneva, the informal labour market such as the domestic work is already served by other immigrants.[66]

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62 Tribunal Fédéral, 09 May 2008, 'Extrait de l'arrêt de la Cour de droit pénal dans la cause X. et consorts contre Grand Conseil du canton de Genève (recours en matière de droit public)', ATF 134 I 214, at <www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>.

63 L. Pichonnat, *Faut-il interdire la mendicité ?*, 2012, at <www.globaleducation.ch/globaleducation_fr/resources/MA/Fiche_argumentaire_mendicite_A4.pdf>, last accessed on 4 January 2014, p. 1.

64 Pichonnat 2012.

65 Période transitoire prolongée pour les Bulgares et les Roumains, Le temps, 04 May 2011, at <www.letemps.ch/Page/Uuid/cdf33ea4-7630-11e0-ad9c-5bc151931d57#.UsgTIPYhAtw>.

66 Mesemrom association, *Que savons-nous des roms?, une campagne de Mesemrom*, at <www.mesemrom.org/projets_campagne.html>, last accessed on 03 January 2014.

4.2 The law

On 30 November 2007, the 'Grand Conseil'[67] of the Geneva canton adopted a law (law n°10106) on begging, which modifies the Geneva penal law by adding Article 11A. This law was initiated by some right wing political parties. Article 11A states that an individual found begging will be punished by a fine. Paragraph 2 of this article states that the person who organises the begging will be punished by a fine of at least two thousand Swiss francs. No referendum was held and this amendment was introduced on 29 January 2008.

Since 2009 and according to Article 8 Loi d'application du code pénal suisse et d'autres lois fédérales en matière pénale (LaCP), crimes under cantonal law are subject to the Swiss penal procedural code (CPP). This permits the police to keep the income of the beggars. This is authorised by the CPP as a means of guaranteeing the fine and the procedural costs will be paid (art. 263(1b) CPP).

Before this law there was a regulation in Geneva that also prohibited begging. But with the introduction of the new penal code in January 2007 according to Mesemrom this regulation ceased to be applicable because it had no legal basis. However the police continued to fine beggars. These fines were reimbursed after the state ruled that Mesemrom was right.

4.3 The case

On 24 January 2008 the Mesemrom Association filed an objection under public law with the TF against the amendment of the Geneva penal law (law n°10106).[68] They argued that Article 11A of the law n°10106 is contrary to Articles 27 (economic liberty), 7 (human dignity), 10 (Right to life and personal liberty) Cst. and 8 (Right to respect for private and family life) ECHR and should therefore be set aside.

According to the TF Article 11A law n°10106 is not contrary to the guarantee of economic liberty in Article 27 Cst, which provides for the liberty to choose a profession and have free access to economic and lucrative activities. They argue that begging does not fall within the scope of this article because the guarantee in the article protects all private economic activities practiced under a professional title for profit or income. Indeed, begging is simply a request for help with no payment. In other words as far as the courts are concerned begging is neither a lucrative activity nor work in an economic sense.

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67 Grand Council (legislative organ).

68 Tribunal Fédéral, 09 May 2008, 'Extrait de l'arrêt de la Cour de droit pénal dans la cause X. et consorts contre Grand Conseil du canton de Genève (recours en matière de droit public)', ATF 134 I 214, at <www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>.

The TF focused on the paragraph 2 of Article 10 Cst on personal liberty, which includes free movement and physical and psychic integrity. Under the Swiss law personal liberty is a broad guarantee, which includes all the elementary liberties. In the case the TF addressed the question of whether the prohibition of begging in Article 11A law n°10106 is a violation of the personal liberty and if so is this violation an admissible restriction. As with the other fundamental right, this liberty is not absolute. It is possible to impose restrictions subject to the conditions that these have a legal basis (in case of serious breach a formal law), are justified by a public interest and respect the proportionality principle. The first condition, a legal basis, is met because the prohibition of begging is written in cantonal law. According to the TF, this is a measure to protect the public interest because the authority adopted these provisions to insure security and public order, begging may be a form of anti-social behaviour when beggars become insistent and harass passers-by. The TF also argued Geneva is not the only canton to prohibit begging. According to the authority, there were many complains by private individuals and shopkeepers. The tribunal observed that beggars are often exploited by a network. The above means it is indeed in the public interest to regulate begging. In paragraph 5.7 of the case, the TF examines the principle of proportionality. The principle of proportionality is respected if a restriction of a fundamental right meets three conditions: it has to be able to achieve the goal; a less incisive measure cannot achieve this goal and there has to be a reasonable relationship between the effects of the measure on the situation of the person and the desired results in terms of the public interest. In this case the first condition is fulfilled because the prohibition of begging is able to protect the public interest. In the remaining paragraphs the TF assesses all the possible geographical or temporal prohibition measures. According to this authority these measures will simply move the problems and will not be able to protect the public interest. Another possibility is not to prohibit the begging but specific behaviour such as the causing nuisance. However this would be too difficult to enforce. The conclusion was that the public interest is more important than the situation of the beggars after the adoption of this law. The TF finally came to the conclusion that the principle of proportionality must be respected. All these reasons explain the final decision of the tribunal, being that Article 11 A law n°10106 does respect Article 10 Cst.

This case is also interesting because the courts state that Article 12 Cst. can be invoked by foreign nationals. Anyone who is in a distressed situation and who is not able to provide for his or her own needs has the right to social assistance. The TF observes that in the cantons of Geneva this principle is materialised in Articles 5(1), 8 and 11(3) LIASI.

4.4 Different opinions of associations and political parties

For the opponents of the Geneva law prohibiting begging, this rule only works to stigmatise the Roma and does not combat begging and its causes.[69] As Reiso explained, the problem is not the fact of begging but it is the reaction of the community in front of the spectacle of the misery.[70] Begging is a hard and humiliating activity and not profitable work. The beggars generally earn only around 10 CHF per day.[71] For many persons this law is anti-constitutional and they deplore that the misery becomes punishable. For example, a human rights organisation states that the prohibition of begging represents a costly, ineffective and discriminatory measure. It is expensive because most of the fines are not pay. Most of the beggars fined are Roma and the authority has to return them to Romania (their country of origin). Human rights advocates claim that the cost for the post office, the administrative work of the services imposing the fine, the police and the tribunal's work (if the fine is contested) exceeds three million Swiss francs.[72] Furthermore, the persons involved are truly poor and continue to beg in Geneva. The situation has not changed and there is an increasing number of beggars who do not pay their fines and they send back to Switzerland. The Mesemrom Association has made many appeals against these fines and made many (positive) suggestions to the government about how begging could be reduced in the city, such as financing integration projects in Romania. Unfortunately, for the time being there are no changes in sight. On the 8 December 2011, however, a community of associations and political parties decided to organise a petition demanding the law prohibiting begging be annulled on the grounds that it is inhumane, discriminatory, stigmatising, ineffective and costly.[73] In April 2012 the petition was submitted to the 'Grand Council'. These associations and political parties also organised a campaign about the Roma's issues disclosing the other side of the story to the public. The 'Grand Council' has not yet announced a decision.

Parties supporting the adoption of the law argue the law has many goals such as discouraging the practice of begging, ensuring Geneva does not leave its doors open to beggars and preventing networks operating beggars

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69 Pichonnat 2012, p. 2.

70 S. Herzog, *Les Roms ont droit à l'aide sociale!,* 2008, at <www.reiso.org/spip.php?article86>, last accessed on 4 January 2014, p. 1.

71 RTS radio show 'De quoi j'me mêle', Mendiant, hors de la cité ?, 2012, at <www.rts.ch/la-1ere/programmes/de-quoi-j-me-mele/3845432-de-quoi-j-me-mele-du-25-03-2012.html>, last accessed on 4 January 2014.

72 Humanrights.ch, *Genève: la loi anti-mendicité coûte cher et reste inefficace*, 2011, at <www.humanrights.ch/fr/Suisse/interieure/Poursuite/Poursuites/idart_8974-content.html>, last accessed on 4 January 2014.

73 Mesemrom association, *Non à la criminalisation de la mendicité!*, 2012, at <www.mesemrom.org/newsletter/>, last accessed on 4 January 2014.

from making a profit.[74] They are convinced that there are some networks in the Roma's population that enrich themselves with the money the beggars acquired from the general public. According to one politician, Christian Leucher, one of these networks comes from France and uses children.[75]

5 Conclusion

To conclude, Swiss social assistance is a solidarity scheme and is the last resort for individuals seeking social security benefits. Because of the existing cantonal competency, this assistance is not the same throughout the Confederation and as a result there are many inequalities between citizens of the same country.[76] The scheme also complex, involving numerous different organs and organisations. As we have seen the entitlement and competency depends on domicile and/or the canton of stay. From the very start of the scheme the question has been whether or not to include foreign nationals. This is a major issue in political debates in Switzerland on social security. Nowadays, the Swiss and the Geneva social assistance scheme has a broad personal scope or application and includes foreign nationals, although some of their benefits may be restricted (articles 20, 21 LAS and 11 LIASI). Whether the Roma could receive social assistance in Switzerland is a difficult question to answer because of the condition set out in Article 11 LIASI of there being an effective residence. As there is no jurisprudence on this issue, we cannot know the opinion of the TF. In my opinion, because the Roma live in Geneva only for a few months for the purpose of acquiring money and then intend to return to their country of domicile, it is improbable that the tribunal will rule they have an effective residence in Geneva. They have an effective presence in the city of Geneva but not an effective residence. Perhaps the Roma could qualify for the special benefits provided for in Article 15 of the Règlement d'exécution de la loi sur l'insertion et l'aide sociale. However, they will have to prove that they are trying to find a job in Geneva. Most importantly, the Roma will have to ask for the assistance and this could be difficult for them because they do not speak the language and the procedure is complex.

The Roma are a poor group of people in need of help in order to live a decent life. However, they do not receive assistance and are forced to beg in many European cities. In Geneva, despite the prohibition of begging, the Roma continue to beg as this is the only way they can survive. Many associations observe that the number of beggars has not fallen in Geneva

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74 Pichonnat 2012.

75 RTS, Mendicité légale: débat avec Christian Luscher, député libéral au Grand conseil et Doris Leuenberger, Présidente de la ligue suisse des droits de l'homme, 2007, at <www.rts.ch/... homme.html>, last accessed on 4 January 2014.

76 Bertozzi & Bonoli 2003, p. 30.

and this this law prohibiting beggars is very costly for the canton.[77] According to some scholars, prohibiting begging has never diminished poverty.[78] For these reasons there are some persons who seek to abolish the cantonal law prohibiting begging. A petition has been drawn up to this end that is currently in the hands of the Geneva Grand Council. For the time being all we can do is wait for the council to pronounce its decision. I believe that begging is a problem caused by the division of wealth between individuals and between states and its prohibition will not provide an effective solution.

[77] Lundi 5 Décembre 2011, Invitation aux médias - Conférence de Presse du 8 December 11, 2011 at <www.mesemrom.org/archives.html>, last accessed on 4 January 2014, p. 4.

[78] Tabin 2012.

Chapter 11
What does the right to housing in the United Kingdom entail and can it be said to be fair and non-discriminatory

Sarah Wallace

1 Introduction

1.1 Intention

During this chapter I will be investigating the right to housing. I will look at the situation in the United Kingdom (UK) and focus on England in circumstances where the situation is not the same throughout the whole of the United Kingdom. This is a controversial topic and a lot will have to be investigated in order to gain a comprehensive view. I will examine how fair this right is in the United Kingdom and whether any discrimination surrounds this right; in order to do this I will first have to gain a basic knowledge of the right in the United Kingdom. I will be drawing conclusions from the eligibility and distribution procedure surrounding the right, in order to see whether it is biased towards any particular group. Furthermore, part of my intention is to look into recent developments surrounding the right to housing and the requirement of local connection, to see if this is fair and non-discriminatory.

1.2 Reason for investigating the right to housing

Social housing in the United Kingdom is greatly oversubscribed. This makes it extremely hard to enter the social housing market and there are long waiting lists. In 2008 there were an estimated 1.6 million households on the waiting list, which is the equivalent of around 4 million people.[1] With public funds in the United Kingdom being low, social housing is being pushed even further and it is unlikely that the market will be able to expand much more.

Social housing is even more important now, as squatting in unused buildings has recently become a punishable offence.[2] As such the right to social housing and how it is put into effect has become an extremely contentious issue, with some strong opinions being formed. I would like to determine

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1 D Robinson, 'New immigrants and migrants in social housing in Britain: discursive themes and lived realities', *Policy & Politics* 2009 (March), p. 5.

2 Charities fear end of 'squatters' rights' could lead to big rise in homelessness, <www.guardian.co.uk/society/2012/aug/31/charities-end-squatters-rights-homelessness>, last accessed on 22 December 2013.

whether there is equal treatment with the right to housing and housing assistance. On the one hand there is a perception in the United Kingdom that foreign migrants are favoured when granting social housing and it has become considered one of the greatest injustices of immigration into the United Kingdom.[3] This is particularly relevant due to recent developments in the Queens Speech where figures show that 'one in 6 of all existing social housing tenants in London are now foreign nationals, and across England, almost 1 in 10 of all new social housing tenancies are given to foreign nationals.'[4]

As the social housing is being financed by tax-payers' money it needs to be assessed whether the houses are distributed fairly. The new rules in the Queens Speech set out that local people should have priority in social housing.[5] This comes after the 2011 Localism Act, which already gave more independence to councils to decide who should qualify for social homes.

While this is the opinion for a lot of nationals of the United Kingdom, other groups perceive the United Kingdom's social housing system to be unduly harsh and discriminatory against non-UK nationals. Some surveys show that there is a high proportion of foreign born in social housing, however others show that in proportion to need, non-UK nationals are receiving less housing. It also needs to be looked at whether the tests on foreign born are fair and whether they really have free access to housing. It should be considered whether harsher tests can be justified in order to prevent social-benefits tourism.

With this in mind, it must be examined whether the system already in place is fair or whether there is bias towards or against non-UK nationals. Finally it must be concluded whether the new rules being brought in surrounding local connection tests can be justified.

1.3 Method

Firstly I will look at what the right to housing is and where it can be found. Secondly, I will go on to explain how far the right to housing and housing assistance can extend and examine how it is administered and financed in the United Kingdom. I will then look individually at the eligibility of UK nationals, refugees, those with indefinite and limited access and citizens from EU

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3 Robinson 2009, p. 1.

4 Tough new housing rules to control immigration, <www.gov.uk/government/news/tough-new-housing-rules-to-control-immigration>, last accessed on 22 December 2013.

5 *Ibid*.

(European Union) and EEA (European Economic Area) countries in order to determine whether there is any discrimination. After this I will concentrate on the procedure for being entitled to housing and housing assistance and whether this is favourable or unfavourable to non-UK nationals. I will also look into recent developments in the law and the knowledge held by the non-UK nationals about the right to housing. Following this I will briefly look at the perception that foreign migrants are favoured when allocating social housing. Finally I will conclude with my own opinion about the fairness of the social housing system in the United Kingdom and whether any of these perceptions about bias can be said to be true. This structure will be used in order to have a basic grasp of the right to housing, before examining the individual requirements of particular groups, so it is possible to see whether the right to housing in the United Kingdom discriminates.

1.4 Sources to be used

I intend to use a range of sources in order to gain an understanding of the right to housing in the United Kingdom. Statutes will, of course, be used in order to understand the basic law. It will be important to look at the main government website[6] in order to understand the basic entitlement and how to become eligible for housing. Websites such as the Shelter website[7] will help to show the general procedure for allocated housing and housing benefit. The housing rights information website[8] is particularly useful as an overview of the right for different members of society e.g. for refugees, and this can show how widely the right to housing can vary.

I will also use a variety of articles, some of which discuss whether foreign born applicants have an advantage and others which examine whether they are disadvantaged.

2 The right to housing

2.1 The right to housing and where it can be found

The right to social assistance and housing is vital. Housing is very important in order to survive and it can be extremely costly to quality of life and survival if someone does not have somewhere to live. The right itself goes beyond having somewhere to live, and requires a certain standard of living that does not put a risk on health and well-being. The right to housing generally can be found in the Universal Declaration of Human Rights in article 25(1) where it

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6 <www.gov.uk/>.

7 <england.shelter.org.uk/>.

8 < www.housing-rights.info/index.php>.

is stated that everyone 'has the right to a standard of living adequate for the health and well-being of himself and of his family, including...housing'.[9] As the United Kingdom is party to the Universal Declaration of Human Rights, it is thus legally bound to fulfil the right to adequate housing. Furthermore the right is mentioned in the International Covenant on Economic, Social and Cultural Rights from the United Nations, which states in article 11(1) that there is a 'right of everyone to an adequate standard of living for himself and his family, including adequate...housing'.[10] The United Kingdom is also bound by this agreement.

As the United Kingdom does not have a constitution, the right to social assistance and housing cannot be enshrined in one. The way in which the right to housing and housing assistance in the United Kingdom should be handled can be found in the Housing Act 1996 and in the Housing and Regeneration Act 2008. Additionally, statutory guidance helping local authorities handle housing situations for those who are homeless, can be found in the Homelessness Code of Guidance for Local Authorities 2006 and in Allocation of accommodation: Guidance for local housing authorities in England 2012.

2.2 What housing and housing assistance can include

The right to housing in the United Kingdom can come in a number of forms. Social housing can be granted for those who are in need. Social housing is 'housing that is let at low rents and on a secure basis to people in housing need.'[11] Housing benefit can also be provided to those who have somewhere to live but are having trouble paying the full rent. There is also homelessness assistance for those who are homeless.

2.3 How is housing and housing assistance administrated and financed in the United Kingdom

Housing, housing benefits and homelessness assistance are all administered by local councils. The funding from these schemes comes from tax paid by citizens of the United Kingdom.

Housing associations can also provide accommodation. 'Housing associations are the main providers of new not-for-profit housing in England, with around

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9 The Universal Declaration of Human Rights, Article 25(1).

10 The International Covenant on Economic, Social and Cultural Rights from the United Nations, Article 11 (1).

11 What is social housing, <england.shelter.org.uk/campaigns/why_we_campaign/Improving_social_housing/what_is_social_housing>, last accessed on 22 December 2013.

3.5 million people living in housing association accommodation.'[12] They are independent but are observed by the state and receive public funding.[13] Housing association accommodation will still require rent to be paid, all be it at a lower rate.

3 Determining eligibility for entitlement to housing

In order to determine whether there is any discrimination within the right to housing in the United Kingdom, it will need to be established how the right to housing and housing assistance is managed for UK nationals and then for other groups. Before anyone can even go about seeing if they are eligible for housing or housing assistance, it must be found that they have a right to housing.

3.1 United Kingdom nationals

All United Kingdom nationals have the right to apply for housing, housing benefit and homelessness assistance from the council. They may also apply for housing from a housing association. UK nationals must still comply with the habitual residency test.

3.2 Refugees

Refugees may still have a right to housing in the United Kingdom if they have been allowed to stay in the United Kingdom due to refugee status, humanitarian protection, discretionary leave or exceptional leave. Refugees have the right to apply to the council or a housing association for housing, homelessness assistance and may also apply for support in paying rent. As long as proof of permission to stay in the United Kingdom can be provided, they are eligible to apply. Family members of a refugee will also be covered as refugees and thus will be equally entitled to housing.

Asylum seekers and refused asylum seekers have no right to housing in the United Kingdom as they have no right to stay in the United Kingdom.

3.3 Indefinite leave

Those with indefinite leave to remain in the United Kingdom could be, for example, those who have worked in the United Kingdom for a long period or have been a partner of a resident of the United Kingdom for a period of

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[12] Housing Associations, <england.shelter.org.uk/get_advice/finding_a_place_to_live/housing_associations>, last accessed on 22 December 2013.

[13] Housing associations and new migrants, <www.housing-rights.info/housing-associations.php>, last accessed on 22 December 2013.

time. People with indefinite leave may apply for housing, benefits from the council or homelessness assistance so long as they can fulfil two conditions: they are habitually resident in the United Kingdom and there must not have been a promise to support them in the last five years. It is possible under any circumstances to apply for accommodation from housing associations as long as there is proof of ability to pay the rent.

3.4 Limited leave

People with limited right to remain in the United Kingdom are likely to be those who have come to the United Kingdom to visit, or work or to study. Those with limited leave do not have the right to claim themselves as legally homeless or apply for housing or housing benefit from the council. Previously if it could be proved that the lack of funds was temporary then they could have been eligible to housing benefit for a maximum of six weeks, however this ended on 29th October 2013 and thus generally, those with limited leave to stay in the United Kingdom are not eligible for any housing support from the council.

It is possible for people with limited leave to apply for housing from a housing association if they can afford the rent but in reality they will be rated low on priority list simply because of the short period of stay.

3.5 European Union (EU) and European Economic Area (EEA) nationals and workers

Anyone from the EU or EEA countries has the right to live in the United Kingdom if they are working, looking for work or self-employed. All EEA and EU nationals have the right to apply to a housing association for housing but only those who are working or former workers are entitled to housing from the council, homelessness assistance and housing benefit. Those looking for employment unsuccessfully do not have the right to council housing or homelessness assistance and must prove habitual residency to claim benefits.

Other EEA and EU nationals can still claim some housing benefits under certain circumstances for example if they are students, have been self sufficient or have been granted a permanent right of residence. It can still be difficult for these people to claim benefits or housing. Students, for example, are able to apply for housing and housing benefit if they can no longer support themselves but they cannot claim homelessness if they have a home in another country. Self-sufficient people will usually lose the right to live in the United Kingdom once they are no longer able to look after themselves financially. Only if it is possible to show that there was previously self-sufficiency for a while, can housing benefit be claimed. Homelessness assistance will not be refused in an emergency though. Generally the rights

of an EU and EEA national, in terms of housing and housing benefit, extend to close members of their family.

Special rules applied to those from A8 accession countries until the 1st May 2011. Now anyone from the A8 accession countries has the same rights to housing in the United Kingdom as other EEA citizens. Additionally, Bulgarians and Romanians had specific rights to social housing and housing benefits until 31st December 2013, but as of the 1st January 2014, Bulgarians and Romanians also have the same rights to housing in the United Kingdom as other EEA citizens do in their situation.

3.6 Croatians

Croatians have a particular set of rules when claiming rights to housing and housing benefits in the United Kingdom. Any Croatian who has been employed for 12 months, is a student or self-sufficient, has the same housing rights as other EEA workers in the same situation. Those who are working either as an authorised worker or are working and are exempted from worker authorisation, are eligible for housing, housing benefit and homelessness assistance. Any jobseekers who haven't worked in the United Kingdom yet are not eligible for any housing rights in the United Kingdom. Everyone has the right to apply to the housing association for housing but as usual this will only be granted if the rent can be afforded. These specific rights will be in place until at least 30th June 2018.

3.7 Those with no access to public funds

Anyone who does not have a right to live in the country also has no right to housing of any kind. This includes refused asylum seekers, people who have overstayed their visas and other irregular migrants.[14]

4 The tests for housing and housing assistance after the eligibility test

Emergency housing can be vital for the homeless. Anyone living in England who is homeless, may have a right from the local council to be housed but there are a number of criteria to be fulfilled and questions to be asked first.[15] The council will first need to confirm eligibility to the right to housing in the United Kingdom and will then look into the current housing situation. If

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[14] Other Migrants and NRPF, <homeless.org.uk/migrants-nrpf#.UZJ3K6KmiAg >, last accessed on 22 December 2013.

[15] Emergency Housing Rights Checker, <england.shelter.org.uk/get_advice/downloads_and_tools/emergency_housing_rights_checker>, last accessed on 22 December 2013.

the current housing situation is poor then the council will look at whether the applicant can be considered to be a priority. Someone who is a priority for housing would be someone who is considered more vulnerable than most. Should these criteria be fulfilled the council will enquire about how any previous home was lost and if due to negligence, the applicant could be considered intentionally homeless which would mean a loss of right to housing. The final criteria to be observed would be whether there is a local connection. As the emergency housing is administered by the local council, it will be required that there is a particular connection with that council to justify them paying for the housing or at least that there is not a stronger connection with a council elsewhere. Here a lot of non-UK nationals will lose the right as it will have been hard for them to obtain a local connection.

Permanent housing comes in the form of council housing or housing association housing. A council house can be applied for through your local council and then the applicant will be put on a waiting list. Housing will be allocated in order of need. A priority person would be homeless or living in poor conditions. The test for housing association accommodation is similar as generally it is applied for through the council in the same way as council housing. Housing associations are obliged to treat all housing applicants the same and cannot discriminate in any way because of immigration status.[16]

In order to be eligible for housing benefit, the applicant must pay rent, be on low income and have poor savings. To be eligible for homelessness assistance you merely have to be legally homeless.

Officially, once eligible to housing and housing benefit, everyone should be treated the same and have equal opportunity to the housing as to those in the same position. In principle it may still be harder due to obstacles like the local connection test. The court in *Bah v United Kingdom* found that 'it is legitimate to put in place criteria according to which a benefit such as social housing can be allocated, when there is insufficient supply available to satisfy demand, so long as such criteria are not arbitrary or discriminatory'.[17] Thus it is acceptable to put in tests such as the local connection test, in order to protect the small amount of social housing, as long as the test is not openly discriminatory. The local connection criteria is harder for foreign migrants to fulfil but not necessarily discriminatory.

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[16] Opening doors training modules, <www.cih.org/resources/policy/Opening%20Doors/module3.pdf>, last accessed on 10 January 2014.

[17] BECHR 27September 2011, 56328/07 (*Bah v the United Kingdom*), par 49.

5 The Localism Act 2011

The Localism Act came into place in 2011 and gave a lot of extra power to local councils in how they choose to administer housing in their area. This of course had an impact on the right to housing for non-UK nationals. While the act did not affect who was eligible for housing or housing benefit, it allowed local councils to decide how it was distributed and this meant that local councils could effectively bar immigrants and migrants should they wish. One example of a council using this is in Barnet, in London, whose housing allocation policy states that except in certain circumstances, those with no local connection to Barnet will not be able to qualify for a housing allocation.[18]

6 Further developments

While this is the current situation, the Queens speech of the 8th May 2013 sets out the intention to focus on the local element even more so, in order to prioritise local people. In order to tackle the feeling that foreign migrants are favoured, the idea has been put forward that councils have a requirement that people have lived in the area for a minimum of two years before they are even accepted onto the waiting list to be considered. Furthermore, it suggests that councils set other tests for connection with the area, for example having family in the area. The overall goal is to really push the idea of a local connection, which could really set foreign migrants at a disadvantage, as it is of course harder for them to gain a long standing local connection. There has not yet been any legislation surrounding this development but in October 2013, the Department for Communities and Local Government released the consultation paper 'Providing social housing for local people: Strengthening statutory guidance on social housing allocations', which further set out the proposals for statutory guidance on social housing allocation. This paper reiterated the intention that local authorities use a two year residency test and additionally use other qualification criteria to ensure applicants have a strong association with that area. Additionally on 31st December 2013, updates were made to the 'Allocation of accommodation: Guidance for local housing authorities in England' and also 'Providing social housing for local people' was created. These ensure that people must have lived in the local area of that council for at least two years before being allowed onto the waiting list for social housing. This is another move towards harsher local connection tests, and shows the intention of the government to continue with plans to make social housing rules stricter.

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[18] W Wilson, *Allocating social housing (England)*, Commons Library Research Paper, London 2013, p. 5.

Furthermore in 2008 suggestions were put forward to replace the settled status with 'probationary citizenship' which would not include any entitlement to social housing or any housing rights. The criteria to gain probationary citizenship could include things like fluency in English and to gain full citizenship even more requirements would have to be met. This would make it even harder to foreign migrants and immigrants to gain any kind of housing.[19]

7 Lack of information and knowledge

Lack of knowledge about social housing could also affect the amount of access people have to social housing and housing benefit. It is suggested that foreign migrants are disadvantaged as information about housing rights is not provided in all languages or simply, and it can be difficult to obtain reliable housing advice. Many non-UK residents who fulfil all the appropriate criteria may, therefore, believe they have no right to housing in the United Kingdom or may be put off by not fully understanding the procedure of applying.[20]

8 The perception that foreign migrants are favoured in allocating social housing

The idea that foreign migrants could be favoured in the social housing market stemmed from Margaret Hodge's article in the Observer which questioned whether there should be any right to housing for new migrants.[21] This launched a lot of research into whether foreign migrants were in fact favoured.

The Institute for Public Policy Research (IPPR) found that in 2008 there was no evidence to suggest that new migrants were favoured in terms of social housing. They had, in 2008, made up 3% of the population but only 2% of those in social housing.[22] The Social Housing Allocation and Immigrant Communities study of 2009 also found there was no evidence of foreign migrants being favoured and in fact there was a small suggestion that minorities may be slightly, unintentionally, discriminated.[23] The Joseph

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19 J Rutter & M Latorre, *Social housing allocation and immigrant communities*, Manchester: Equality and Human Rights Commission 2009, p. 15.

20 Robinson 2009, p. 11.

21 Margaret Hodge, 'A message to my fellow immigrants' *The Observer* (London, 20th May 2007). <www.theguardian.com/commentisfree/2007/may/20/comment.politics>, last accessed on 10 January 2014.

22 W Wilson, *EU migrants: entitlement to housing assistance (England)*, Commons Library Research Paper London 2013, footnote 38.

23 Wilson 2013, footnote 39.

Rowntree Foundation found that new migrants are often given the worst housing.[24]

Misunderstandings can also arise, as often social housing is sold and used a private housing. This gives the perception that migrants are living in social housing, when they are often not. In addition, the majority of asylum-seekers are single males who would, therefore, not expect social housing.[25]

Hence it can be seen that the idea that foreign migrants are being favoured for social housing cannot really be backed up with evidence.

9 Conclusion

As can be shown, there are clear differences between the rights of those in the United Kingdom and the rights of those from outside the United Kingdom. To begin it is harder for foreign migrants to be eligible for social housing. While anyone from the United Kingdom is eligible to apply for housing and housing assistance if they are habitually resident, strict criteria apply to others. This includes minimum stays in the United Kingdom and often also a requirement of having worked or having been self-sufficient. These criteria also vary between different classes of foreign migrants.

Once considered eligible to apply for social housing, theoretically everyone should have an equal chance to the housing depending only on their situation. In principle, it is still harder for those who are not born in the United Kingdom to gain access to this housing due to the local connection test. This is indirectly discriminatory against non-UK citizens as, of course, it is much harder for them to gain a local connection.

The Localism Act has made it even harder as it effectively means that local councils can impose any criteria or preference that they wish. Lack of information can also mean that non-UK nationals are missing out on housing where they could be entitled to it.

Hence it can be seen, already, that the system of right to housing in the United Kingdom is favoured towards local applicants. The rules to be brought in shortly will worsen this situation as the local connection test will be pushed even further, making it harder for those who are not able to build such a strong local connection. These new criteria will likely make it very difficult for foreign migrants to obtain housing and surely can be seen as indirectly discriminatory.

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[24] Wilson 2013, p. 14.

[25] Rutter & Latorre 2009, p. 10.

It does not seem from looking at the facts that immigrants are favoured in any way in regards to housing. The statistics show that most of the housing goes to UK nationals and a lot of those from outside the United Kingdom are housed in the private sector. In order to obtain housing or benefits, migrants have to have lived in the United Kingdom for some time and also be put on a waiting list. Accordingly it can be seen that those who receive the housing are not just looking for quick housing but actually have an intention to stay in the United Kingdom. Overall it cannot be concluded that the social housing system is unfairly biased towards non-UK nationals.

It seems to me that the housing system cannot be said to be favoured towards non-UK nationals and in fact seems to be indirectly discriminatory against them. It does not appear to be intentional, but with the eligibility criteria being harder, with the addition of the local connection test and the lack of information, it seems extremely difficult for non-UK nationals to receive housing in the United Kingdom.

Chapter 12
Rightlessness under the rule of law in the Netherlands? On the position of non-returnable foreign nationals in the Netherlands

Sybren Koopmans

1 Introduction

The past year had seen images in the news of refugees living in tent camps. Although such images are usually associated with African or Arabic countries, these were actually filmed in Osdorp, Ter Apel and The Hague, in other words in the Netherlands. These camps house refugees whose application for asylum has been rejected but who, in the circumstances, cannot be returned. With the construction of the camps the residents were trying to draw attention to the appalling conditions in which they live: life on the streets without shelter and facilities. Meanwhile, the camps have been cleared and the foreign nationals have vanished from the scene, but this does not mean that the circumstances they tried to denounce have also disappeared.

How come that in a prosperous and well-organised country like the Netherlands, people are still forced to live on the streets? Why can these people not claim protection? In this chapter I will answer the question of whether non-returnable and in fact undocumented foreign nationals staying in the Netherlands qualify for protection in the Netherlands.

This chapter only focuses on non-returnable foreign nationals because it is precisely these cases that reveal how distressing the situation really is: the foreign nationals stay illegally in the Netherlands and must return to their home country but in the majority of cases this is simply not possible.

First, in paragraph two, I discuss when exactly a foreign national becomes an undocumented migrant, followed, in paragraph 3, by a summary of the consequences of such an irregular status. In paragraph 4 I examine whether or not Dutch legislation violates the human rights of these foreign nationals by investigating whether any international human rights apply in these cases and if so, what impact these human rights conventions have on the position of the non-returnable foreign nationals. I draw my conclusions in paragraph 5.

2 Irregular stay according to the Dutch Immigration Act

The *Vreemdelingenwet 2000* (Dutch Immigration Act, hereafter Vw) regulates when a foreign national can stay in the Netherlands legally. Article 8 of this

act stipulates the circumstances and conditions under which a foreign national resides regularly. In total there are 12 grounds that can be classified into four categories:

- regular stay on grounds of a permit;
- regular stay on grounds of community law;
- regular stay pending the decision on an application;
- regular stay on grounds of the act.

A regular foreign national qualifies for assistance, social security and social services under Article 11 Vw.

During the application process for a residence permit or for asylum, on grounds of Article 8 Vw, a foreign national stays legally in the Netherlands. If a permit is refused, during the objection and appeal proceedings the foreign national continues to stay legally in the Netherlands insofar as there is a ruling that the foreign national may not be returned until a decision has been made in the objection or appeal proceedings.

As of 1 January 2010 sick asylum seekers who have exhausted all legal remedies can receive protection during the medical procedure pending a decision. This is in implementation of the Spekman motion adopted by the Lower House.[1] If the above circumstances or conditions are not met the foreign national is then classed as an undocumented migrant.

3 Consequences of irregular stay in the Netherlands

3.1 Consequences

Not qualifying for legal residence has two major consequences. The first consequence affects the right of residence. Under Article 27 or 45 Vw the refusal of a residence permit is also considered to be a return decision and is thus a return order for the foreign national. The foreign national is required to return within 28 days. During these 28 days the foreign national is entitled to protection but on the expiry of this period the foreign national has to leave the reception centre; the right to protection lapses automatically with the refusal decision. There are three options:

- the foreign nationals concerned can be detained in a detention centre;
- the foreign national concerned cooperates with the return order and can be transferred to the open detention centre in Ter Apel pending departure. In this case the foreign national is at liberty to leave the centre but must remain in the municipality and report daily;

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[1] *Kamerstukken II* 2008/09, 30 846, no. 4

- the foreign national leaves the reception centre and no longer has shelter: this group ends up on the streets.[2]

The second consequence centres on social services. On 1 July 1998 the *Koppelingswet* (Linkage Act)[3] entered into force in the Netherlands. The purpose of this act is to make it impossible for undocumented migrants to claim benefits and services. The idea behind this is that allowing such claims would encourage what is in principle illegal stay in the Netherlands and would make the residence status of these foreign nationals semi-legal.[4]

This linkage principle is set out in Article 10(1) Vw:

> 'Undocumented migrants are excluded from public services, facilities and benefits provided by an administrative body.'

The principle is set out in more detail in other specific acts. Thus for example an undocumented migrant is excluded from municipal assistance under the *Wet maatschappelijke ondersteuning* (Municipal Assistance Act (Wmo)).[5]

3.2 Non-returnable foreign nationals

Foreign nationals who have exhausted all legal remedies and are thus classed as undocumented migrants have to return to their country of origin. Dutch immigration policy is based on the assumption that foreign nationals who are ordered and willing to return to their country of origin are indeed in a position to do so.[6] In practice this is more complicated. There are many foreign nationals for whom returning to their country of origin is simply not an option: the non-returnable foreign nationals. Figures published by the *Humanistisch Verbond* estimate the number of non-returnable foreign nationals in the Netherlands at between 35000 and 60000.[7] There are several reasons why foreign nationals are in practice not able to return to their

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2 J. van Selm & D. Vanheule, *Deelrapport Eurasylum*, The Hague: ACVZ 2011, p. 25.

3 Act of 26 March 1998 amending the *Vreemdelingenwet* and some other acts and linking foreign national's claims to services, facilities, benefits, exemptions and permits to the regularity of their stay in the Netherlands, Staatsblad 1998, 203.

4 CRvB 24 January 2006, *RSV* 2006, 84, m.nt. G. Vonk and CRvB 20 October 2010, *RZA* 2011/9, r.o. 4.4.

5 Article 8(1) Wmo

6 Article 3.4(1)(w) Vb 2000, Vreemdelingencirculaire 2000 (Vc 2000) B14/3.4.1. Vc 2000 B14/3.1: 'The return policy is based on the assumption that in principle all foreign nationals are able to return to their country of origin. There is currently no country known that fails to comply with its obligations under international law to take back its own nationals.'

7 Onuitzetbaar 2010, p. 3.

country of origin and this failure to return is not always due to reluctance on the part of the foreign nationals:

- For political or administrative reasons the government of the country of origin does not acknowledge the migrant as a national.
- To verify identification acts need to be performed by third parties in the country of origin. For numerous reasons these do not cooperate.
- The foreign national withholds information in a bid to avoid return at any price.
- The Dutch government does not work dynamically on return.[8]

Foreign nationals who have tried to leave the Netherlands but have failed to do so for some reason can apply for a *buitenschuldvergunning* (no-fault residence permit). To qualify for such a permit the foreign national must meet strict conditions and the burden of proof lies with the foreign national. What is more, the fee for a permit application is EUR 950, which is a major obstacle for foreign nationals seeking to submit an application. As a result in 2011 only 30 no-fault residence permits were issued.[9] In other words this residence permits provide a solution for very few non-returnable foreign nationals.

The right to shelter lapses automatically when a residence permit or asylum is denied. It makes no difference whether or not the foreign national cooperates with his or her return. The result of this is that foreign nationals who are unable to return to their country of origin, end up on the streets with no protection and excluded from facilities.

By reason of their irregular residence status these non-returnable foreign nationals are at risk of being arrested and detained. Because they cannot be returned to their country of origin, after some time these foreign nationals are returned to the streets. The Dutch even have a term for these non-returnable foreign nationals who are sometimes quite literally left on the streets: 'geklinkerd'. [10] Back on the streets they are once again at risk of being arrested and detained, which regularly occurs.[11]

Municipalities are left to deal with the consequences of this legislation and thus in practice the task of providing protection is shifted to local level. Because municipalities do not wish to be confronted with homeless

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8 Onuitzetbaar 2010, p. 2.

9 Kamerstukken II, 2012/13, 29 344, no. 109.

10 T.Barkhuysen, 'Geklinkerd', *NJB* 2010, p. 2579.

11 R. van de Griend, 'De illegalencarrousel', *Vrij Nederland* 14 April 2007, <www.vn.nl/Standaard-media-pagina/DeIllegalencarrousel.htm>, an article with an illuminating insight into the practice of '*klinkeren*'.

foreign nationals, in many cases, in spite of the rulings under Dutch national legislation, local protection is arranged. The municipality's duty of care, the impact on the streetscape and prevention of the use of hard drugs and prostitution play a role in this. Considerations in terms of human rights are also cited as a reason to provide protection.[12] Private organisations also provide emergency protection to non-returnable foreign nationals, sometimes, but not always with municipal subsidy.

In the 'Administrative Agreement on immigration policy' that the then Secretary of State for Justice Albayrak concluded in 2007 with the *Vereniging van Nederlandse Gemeenten* (Association of Municipalities in the Netherlands (VNG)), it is agreed that municipalities will cease to provide emergency protection to this group of undocumented migrants staying in the Netherlands with effect from 1 January 2012.[13] It emerges however that municipalities have continued to provide emergency protection after this date. Indeed in some cases municipalities have even provided other facilities such as assistance to foreign nationals who should be excluded from this under Dutch legislation and regulations.[14] In other words the municipalities are administratively out of line.[15]

4 Dutch legislation and human rights

The above paints a harrowing picture of how immigration policy in the Netherlands is regulated, in which notably the linkage principle may lead to undesirable situations. In particular, the position of undocumented migrants who would like to return but who cannot due to circumstances beyond their control leaves a bitter aftertaste. The fact that municipalities still organise protection for non-returnable foreign nationals, partly based on human rights considerations and against the will of the central government, indicates that there may be omissions in the immigration policy being pursued. This picture is confirmed by recent case law that reviews the statutory arrangements on the basis of, for example, human rights conventions. This case law points

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[12] Van Selm & Vanheule 2011.

[13] Ministry of Justice, Association of Municipalities in the Netherlands, Administrative Agreement between Secretray of State for Justice and the Association of Municipalities in the Netherlandson immigration policy, The Hague 25 May 2007. See <www.vng.nl/Documenten/Extranet/Sez/ VI/Akkoorddef.pdf>.

[14] Recht op menswaardig bestaan 2012, p. 16.

[15] Otherwise Prof T. Spijkerboer of the VU University Amsterdam argues in the Binnenlands Bestuur of 30 November 2012 that municipalities may (continue) to provide emergency protection because the state has failed to uphold its part of the agreement to make 'maximum effort' to ensure that failed asyslum seekers are not left on the streets. See <www.binnenlandsbestuur.nl/Uploads/2012/11/Conclusies-Spijkerboer.pdf>.

out several times that Dutch legislation conflicts with the human rights contained in these international conventions.

4.1 Important international conventions and regulations

First it is important to realise that not all international conventions can be assessed by the Dutch courts. Under Article 94 of the Dutch Constitution only self-executing provisions of conventions and decisions of international organisations have direct effect. Thus not all (provisions of) conventions have direct effect, which means that even if Dutch legislation conflicts with these conventions it will continue to apply. Several international regulations are of particular importance for the status of non-returnable foreign nationals:

The International Covenant on Economic, Social and Cultural Rights (ICESCR)
This convention lists diverse economic, social and cultural rights. The most important rights are the right to social security, including social insurance (Article 9), the right to protection and assistance to families, in particular to children and young people (Article 10), the right to an adequate standard of living including adequate food, clothing and housing (Article 11) and the right to the highest attainable standard of physical and mental health (Article 12). Further to the Dutch reports on compliance with the convention in its observations dated 19 November 2010 the UN Committee on Economic, Social and Cultural Rights (CESCR) expressed its concern about the fact that undocumented migrants, including families with children, are not entitled to a basic right to shelter and are rendered homeless after their eviction from reception centres.[16]
The *Centrale Raad van Beroep* (Central Court of appeal in the Netherlands (CRvB)) and the *Afdeling Bestuursrechtspraak Raad van State* (Administrative Jurisdiction Division of the Dutch Council of State (ABRvS)) have both ruled that the provisions in the ICESCR do not have direct effect.[17] Despite the concern of the CESCR direct appeal to these provisions in a Dutch court is thus a non-starter.

Convention on the Rights of the Child (CROC)
The Convention on the Rights of the Child sets out children's rights. Virtually all aspects of the lives of young people are addressed in the 54 articles of this Convention, such as the interests of the child, development, education, participation and protection against child abuse.

Article 2 CROC contains a non-discrimination clause. Article 3 stipulates that the interests of the child should be given priority in all measures affecting children. Article 26 contains the rights to social security facilities. The Netherlands has made a reservation in respect of this article. The

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[16] Van Selm & Vanheule 2011, p. 7-8.
[17] CRvB 11 October 2007, *LJN* BB5687 and ABRvS 29 June 2011, *LJN* BQ9680.

Netherlands does not recognise a claim of a child to social security but arranges this matter through the parents. Article 27 stipulates that each child has the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Parents are primarily responsible for the living conditions of the child; the government should help them with this by providing assistance and support so that the child has at least enough food and clothing and adequate housing.

Both the ABRvS and the CRvB are slow to recognise the provisions in the CROC as having direct effect. An appeal to a provision of this convention is often not upheld because the court is of the opinion that the provision lacks direct effect. The jurisprudence of these two legal institutions on this subject is divergent.

The ABRvS seems only to recognise Article 12 CROC[18] as having direct effect.[19] Some of the provisions in Article 3 CROC are recognised as having direct effect. According to the jurisprudence of the ABRvS Article 3 of the CROC has direct effect:

> '...insofar as it states that in all actions concerning children the best interests of the child should be a primary consideration. With regard to the importance that in practice should be attached to the interests of the child, in view of its wording Article 3(1) CROC does not contain a standard that is directly applicable by the courts without further elaboration in national legislation and regulations. In this context the administrative court should however assess whether the administrative body has taken sufficient account of the interests of the child and has thus remained within the limits of the law when exercising its authority. This assessment is conservative.'[20]

Article 3 CROC thus guarantees that procedures should in a more general sense take the best interests of the child into account.

The CRvB has only recognised Article 12(1) CROC as having direct effect[21]; the CRvB has denied the other articles direct effect. Contrary to the ABRvS, the CRvB has established that Article 3 does not have direct effect. [22]

Despite the fact that legal institutions only recognise a small number of articles as having direct effect, the CROC is still influential in a less direct manner. Children's rights are namely also guaranteed under EU law and by the ECHR. The Court of Justice of the European Union sees the CROC as an important tool for

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18 Article 12 states the right of the child to be heard.

19 J.H. de Graaf e.a., *De toepassing van het Internationaal Verdrag inzake de Rechten van het Kind in de Nederlandse Rechtspraak 1 januari 2001 - 1 september 2011*, Nijmegen: Ars Aequi Libri 2012, p. 169.

20 ABRvS 11 April 2013, *LJN* BZ8723, r.o. 7.1.

21 CRvB 24 January 2006, *LJN* AV0197.

22 CRvB 2 November 2010, *LJN* BO3025, r.o. 6.5.3.

interpreting EU law. The European Court of Human Rights (hereafter: ECtHR) guarantees children's rights by interpreting the rights set out in the ECHR, such as the right to family life and the right to freedom and security, in the context of the CROC.[23] These developments within EU law and the jurisprudence of the ECtHR have therefore enabled the children's rights set out in the CROC to gain more influence and it is possible that they will continue to do so.[24]

European Social Charter (ESC)
The ESC regulates a large number of social rights. The following articles are particularly relevant for the right to protection:

Article 7: the right of children and young persons to protection;
Article 11: the right to protection of health;
Article 12: the right to social security;
Article 13: the right to social and medical assistance;
Article 14: the right to benefit from social welfare services;
Article 16: the right of the family to social, legal and economic protection;
Article 17: the right of mothers and children to social and economic protection;
Article 30: the right to protection against poverty and social exclusion;
Article 31: the right to housing;

The appendix to the ESC states that foreign nationals are only covered by the articles in so far as they are nationals of other parties to the convention and lawfully resident within the territory of the party concerned.

The European Committee of Social Rights (ECSR) monitors compliance with the ESC. Conclusions of the ECSR are non-binding, unlike the rulings of the ECtHR. Yet the conclusions do have authority. Further to a complaint submitted by Defence for Children the ECSR concluded that the Netherlands was acting contrary to the ESC by denying shelter to undocumented children residing in the Netherlands.[25] The ECSR concluded that states are required to provide shelter to undocumented children residing in their territory insofar as they fall within the jurisdiction of the state.[26] This conclusion is as such surprising because, as mentioned earlier, the ESC does not cover undocumented migrants residing in the territory of a state. In early 2013 the Dutch Protestant Church submitted a complaint through the European Church Conference demanding that the

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[23] E.g. ECHR 20 March 2012, *C.A.S. and C.S./Romania* (26692/05).
[24] A.M. Reneman, 'Het kinderrechtenverdrag krijgt tanden. Over hoe het VN-Verdrag inzake de Rechten van het Kind via het EU-recht en het EVRM binnendringt in het Nederlandse vreemdelingenrecht', *A&MR* 2011 (8), p. 349-362.
[25] ECSR 20 October 2009, 47/2008.
[26] AZCV 2012, p. 28.

Netherlands provide undocumented migrants with food, clothing and shelter.[27] This complaint is currently being deliberated upon by the ESCR. On 25 October 2013 the ESCR announced a preliminary opinion in which it pronounced that the Dutch government should adopt all possible measures to provide basic facilities for undocumented migrants, in particular because despite the linkage principle there are options to do so under current legislation and regulations.[28] This is the first time the ECSR has issued a preliminary opinion. The secretary of state requested the Advisory Department of the Dutch Council of State to advise on the scope of such a preliminary opinion and the extent to which this opinion is binding. The Advisory Department concluded that a preliminary opinion is not binding and creates no individual enforceable rights.[29] The Dutch secretary of state for Security and Justice therefore chose to ignore the opinion of the ECSR.[30]

The ESC does not have direct effect, a conclusion that has been drawn by both the CRvB[31] and the ABRvS.[32] However this convention too does have indirect influence. The *Hoge Raad* (the Netherlands Supreme Court (HR)) recently ruled within the context of a claim that the Dutch state acted unlawfully by acting contrary to the standard of due care described in Article 6:162 of the Dutch Civil Code ('that which according to unwritten law is generally aspired to in society') and not by committing an act or an omission contrary to a statutory obligation. This ruling relied partly on the ESC and the conclusion of the ECSR in combination with Article 8 ECHR to supplement the general standard of due care, as a result of which the question of whether the ESC has direct effect could be avoided.[33]

The Return Directive

The Return Directive[34] is a European directive for the purpose of developing an effective and humane return policy based on common standards and fully respecting the human rights and fundamental freedoms of the persons concerned. Point 12 of the recital states that member states should provide the basic conditions of subsistence to third-country nationals who are staying illegally but who cannot yet be removed. In this the protection of the child and respect for family life should be a priority.[35]

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27 Conference of European Churches (CEC) v. The Netherlands, Complaint No 90/2013, 21 Jan. 2013.

28 ECSR 25 October 2013, 90/2013.

29 Recommendation 13 December 2013, W03.13.0414/II/Vo.

30 Letter of 5 November 2013, *Kamerstukken II* 2013/14, 19 637, no. 1745.

31 CRvB 19 April 2010, *LJN* BM0956, r.o. 4.8.1.

32 ABRvS 8 October 2010, *LJN* BO0685, r.o. 2.1.1.

33 HR 21 September 2012, *JV* 2012/458, m. nt. C.H. Slingenberg, in particular point 3 in the note.

34 Directive 2008/115/EC.

35 HR 21 September 2012, *JV* 2012/458, m. nt. C.H. Slingenberg, r.o. 3.5.2 and 3.7.2.

Because the recital of the Return Directive does not have direct effect,[36] a direct appeal to these provisions has no chance of success in court. However, point 12 of the recital can have indirect influence because the recital can be used in the context of a claim based on an unlawful act to supplement the general standard of due care.[37]

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
The ECHR protects a wide range of human and civil rights of residents of party states. The most important articles in terms of the right to protection are Article 3 and Article 8 ECHR, which are frequently used in court to reason a right to protection. Article 3 ECHR establishes that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Article 8 ECHR establishes that everyone has the right to respect for his private and family life, his home and his correspondence. Article 14 ECHR contains the non-discrimination principle.

All three of these articles have direct effect. Article 8 ECHR is often interpreted with reference to convention provisions that do not have direct effect as a way of ensuring that these provisions are indirectly effective.[38] As a result an appeal to the ECHR has the highest chance of success in court.

4.2 Human rights case law

From paragraph 4.1 it follows that only a few relevant human rights provisions can be invoked against the state to make a case for a right to protection, of which Article 3 and Article 8 ECHR are important. The provisions in the CROC can be invoked in conjunction with Article 8 ECHR, the provisions in the CROC and the ESC playing a mainly supplemental role.[39] In this paragraph I discuss the relevant jurisprudence on human rights, with particular focus on the position of non-returnable foreign nationals.

Principle of equality and non-discrimination
In practice the Linkage Act has ensured that only subject to specific conditions can foreign nationals exercise rights that Dutch nationals are able to exercise without these conditions. A distinction is thus made between nationalities, which would seem to violate one of the most important fundamental rights, the principle of equality and non-discrimination, as set out in Article 2 CROC and Article 14 ECHR. The *Centrale Raad van Beroep* (Central Court of Appeal

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36 Rechtbank 's-Gravenhage (location Haarlem) 2 December 2011, *LJN* BU7384, r.o. 2.12. and 24 November 2011, *LJN* BU6863, r.o. 2.11.
37 HR 21 September 2012, *JV* 2012/458, m. nt. C.H. Slingenberg, r.o. 3.5.2 and 3.7.2.
38 HR 21 September 2012, *JV* 2012/458, m. nt. C.H. Slingenberg, r.o. 3.5.3.
39 ACVZ 2012, p. 39.

in the Netherlands (CRvB)) has however ruled that the distinction between nationalities made in the Linkage Act is consistent with these international non-discrimination rules and thus in the context of an assessment based on these rules considers the objective of the Linkage Act to be acceptable.[40] The European Court of Human Rights (ECtHR) has also ruled that states can make a distinction between nationals and foreign nationals, provided the intended objective is legitimate. Conducting an immigration policy is in this context considered to be a legitimate objective.[41] However, this does not mean that all practical measures taken in the context of this immigration policy are appropriate and necessary. This creates an opportunity to still assess these measures in relation to the principle of non-discrimination.[42] Thus the CRvB has ruled that the validity of the linkage legislation, as this is given substance in the *Algemene Kinderbijslagwet* (Dutch legislation on family benefit), does not hold true for parents who the state knows have resided in the Netherlands with their children for a longer period of time, whose stay was regular during at least some of this period within the meaning of Article 8 (f), (g) or (h) VW 2000 and who have in the meantime created such a bond with the Netherlands that they can be considered to be Dutch citizens.[43] The *Hoge Raad* has however nullified this ruling and pronounced that in these cases too, the distinction made in the Linkage Act is valid.[44] In other words, for the time being, the principle of equality does nothing to help non-returnable foreign nationals.

Right to respect for private and family life, home and correspondence.
Article 8 ECHR can in some circumstances also impose positive obligations on the state that are necessary to effectively safeguard the right to private life and to protection of the family. In addition children and other vulnerable persons in particular have a right to protection. The ECtHR has ruled several times that Article 8 of the ECHR is also relevant in cases concerning the spending of public resources. Here it is important that the state is given an extra large 'margin of appreciation'. When assessing the protection provided under the ECHR the ECtHR attaches importance to the residence status of the foreign national.[45] The assessment of the government's weighing up of the various interests is stricter in the case of foreign nationals who might still qualify for a (temporary) residence status than for foreign nationals who have reached the end of the line.

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40 CRvB 24 January 2006, *RSV* 2006, 84, m.nt. G.J. G. Vonk and CRvB 20 October 2010, *RZA* 2011/9, r.o. 4.4.

41 ECtHR 28 May 1985 (Abdulaziz e.a. t. United Kingdom) *RV* 1985, 105 m.n. Boeles.

42 P.R. Rodrigues, *De grenzen van het vreemdelingenrecht*, Leiden 2010, <media.leidenuniv.nl/legacy/oratie-peter-rodrigues.pdf>, p. 5.

43 CRvB 15 July 2011, *RSV* 2012/238, m.nt. G.J. Vonk.

44 HR 23 November 2012, *JV* 2013/115, m.nt. P.E. Minderhoud.

45 CRvB 15 July 2011, *RSV* 2012/238, m.nt. G.J. Vonk, r.o. 4.5.

Although the legal status of the foreign national plays an important role in the decision as to whether a foreign national qualifies for the right to protection, non-returnable foreign nationals have also invoked Article 8 ECHR with success. This concerns minor non-returnable foreign nationals and their family. In the ruling of 21 September 2012 the Hoge Raad established that the state is legally required (in specific circumstances) to provide adequate protection for minors who have exhausted all legal remedies and whose parents, staying in the Netherlands, refuse to cooperate with their return. The children are namely not responsible for the actions of their family.[46] Family members of minor foreign nationals who qualify for protection under Article 8 ECHR can also acquire a right to protection by invoking the right to respect for family life.[47] In addition vulnerable foreign nationals residing illegally may have a right to protection if that foreign national suffers from an advanced life-threatening illness.[48]

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
This prohibition in Article 3 ECHR applies a stricter assessment than does Article 8 ECHR.[49] As a result the ECtHR is cautious in ruling that a state has acted contrary to this article. To date the ECtHR has only established that an act is contrary to Article 3 ECHR in relation to this in a case involving an asylum seeker and a violation of human dignity, due to the appalling living conditions in which he had to live.[50] From this ruling it follows that a breach of Article 3 ECHR can arise when protection or other facilities is denied resulting in degrading or inhuman treatment.[51]

5 Conclusions

The Netherlands has strict immigration legislation. Part of this legislation is the introduction of the linkage principle as a result of which the status of a foreign national is also relevant for the right to social provisions. The objective of the Linkage Act is to prevent the situation in which undocumented migrants are given insufficient incentive to return to their country of origin. This is based on the assumption that it is also possible for the foreign national to return to his country of origin. In practice in a significant number of cases it emerges that such a return is simply not possible: these foreign nationals are non-returnable. For some of these foreign nationals this is the

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46 HR 21 September 2012, *JV* 2012/458, m. nt. C.H. Slingenberg
47 HR 21 September 2012, *JV* 2012/458, m. nt. C.H. Slingenberg and CRvB 30 May 2011, *LJN* BQ6438.
48 CRvB 2 May 2012, *LJN* BW5501.
49 CRvB 2 May 2012, *LJN* BW5501, r.o 4.12
50 EHRM 21 January 2011, no. 30696/09.
51 ACVZ 2012, p. 39.

result of their own reluctance, but a large number are not able to return for reasons outside their control.

In particular the strict application of the linkage principle means that a large number of non-returnable foreign nationals end up on the streets without protection or facilities. This results in appalling and inhumane situations. In several cases this strict legislation creates situations that violate the human rights set out in international conventions. This is evident from *inter alia* the comments of the UN Committee for Economic, Social and Cultural Rights and the European Committee for Social Rights, which stated that human rights have been violated and criticised in particular the fact that children who have exhausted all legal remedies are denied protection. The strict enforcement of the Dutch immigration legislation is in part adjusted by the courts. Here the direct effect of Article 8 ECHR has a particularly important role to play, partly interpreted in the light of other conventions. Via this case law the rights of non-returnable children and vulnerable persons have been significantly improved with the result that they may still qualify for protection. Family members of these children may also qualify for protection as a result of this family connection.

But it remains a fact that in individual cases these rights have to be enforced in court. Partly in view of the developments in jurisprudence as a result of which the linkage principle is often not applied to non-returnable foreign nationals, meaning that they still qualify for protection, it would seem sensible for the Dutch government to amend national legislation on this issue to create more scope for the protection of non-returnable foreign nationals. Such a legislative amendment would indeed not necessarily be contrary to the objective of the Linkage Act, namely facilitating the quick return of the foreign national. After all would it not be easier for foreign nationals to cooperate with their return if they have a roof over their head and enough to eat so that they would not have to spend their time and energy on surviving the harsh life on the streets?[52]

[52] ACVZ 2012. P. 46.

Chapter 13
The impact of the criminalisation of illegal stay on the living conditions of undocumented migrants

Dennis Ros

1 Introduction

On 7 January 2013 the Dutch Government proposed a bill amending the Vreemdelingenwet 2000 (Dutch Immigration Act (Vw)) in order to criminalise the illegal stay of foreign nationals in the Netherlands.[1] Under Dutch law, only people who have absolutely no legal ground to stay in the Netherlands are classified as undocumented migrants.[2] Therefore, asylum seekers and refugees whose application to stay has not been denied are not classed as undocumented migrants.

The Netherlands seems to be one of the very few countries in the European Union in which illegal stay is not as such a criminal offence. Furthermore, until the bill is enacted only illegal stay contrary to certain administrative law measures is punishable. In other countries, the criminalisation of undocumented migrants because of their illegal stay does not necessarily depend on preceding administrative steps. Moreover, in those countries a criminal fine or a prison sentence or both can be imposed on undocumented migrants simply because they do not possess any kind of residence permit.

In general criminal sanctions are imposed for two reasons: punishing the offender and deterring people from committing criminal offences. In other words, they should have unfavourable consequences. Based on the presupposition that undocumented migrants live in relatively poor conditions and given the intended unfavourable consequences of criminal sanctions it could be expected that the criminalisation of illegal stay would have a negative impact on these living conditions. This negative impact can become apparent in two different ways. First, undocumented migrants could lose their homes once they are discovered by the authorities. Second, undocumented migrants could refrain from seeking proper housing out of fear for discovery. These consequences are based solely on theoretical assumptions. Because illegal stay as such is not punishable in the Netherlands as yet, it is interesting to compare the living conditions of undocumented

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1 *Kamerstukken II* 2012/13, 33 512, no. 2 (all Dutch official publications from 1995 to present can be consulted on <zoek.officielebekendmakingen.nl/>).

2 See Article 8 of the Immigration Act 2000.

migrants in the Netherlands and those in some other European countries. Only then can it be established whether the theoretical assumptions are justified by experience and whether these would apply in the Netherlands once the bill has been enacted.

Below we examine the current living conditions of undocumented migrants in the Netherlands and discuss the expected impact the criminalisation of their illegal stay will have on these living conditions. This is followed by a study of the living conditions of undocumented migrants in two big West European countries where illegal stay is already punishable: the United Kingdom and Germany.[3] We conclude by answering the question of whether or not the criminalisation of illegal stay does indeed have a negative impact on the living conditions of undocumented migrants and in particular whether the living conditions of undocumented migrants in the Netherlands will be negatively affected after the bill has been enacted.

2 The Netherlands

2.1 Illegal stay and homelessness

According to a report by the *Wetenschappelijk Onderzoek-* en *Documentatie–centrum*, WODC,[4] there are no nationwide statistics indicating how many undocumented migrants are staying in the Netherlands,[5] and thus no exhaustive data about this number is available.[6] Nevertheless, the report refers to research which states that the number of undocumented migrants staying in the Netherlands between April 2005 and April 2006 can be estimated at 100,000 of which 30 to 40 per cent stay in one of the four largest Dutch cities.[7]

In this chapter, unless stated otherwise, homelessness is understood to have the meaning given to it in the ETHOS Typology on Homelessness and Housing Exclusion of FEANTSA (the European Federation of National Organisations working with the Homeless).[8] The ETHOS typology distinguishes between roughly four types of homelessness, namely rooflessness, houselessness, insecure housing and inadequate housing. It is

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3 L.I.E. Picon, Criminalizing hope. Human rights implications of the criminalisation of irregular immigration in EU member states and the EU, E.MA Awarded Theses 2010/2011 (published on <www.eiuc.org>, last accessed on 16 January 2014), p. 27.

4 Dutch Research and Documentation Centre.

5 E.M.Th. Beenakkers, M.H.C. Kromhout & H. Wubs, *Illegaal verblijf in Nederland. Een literatuuronderzoek*, The Hague: WODC 2008 p. 13-14.

6 Beenakkers, Kromhout & Wubs 2008.

7 Beenakkers, Kromhout & Wubs 2008 p. 23 and 28; the four largest cities are Amsterdam, Rotterdam, The Hague, and Utrecht.

8 A PDF document with the full ETHOS typology can be found on <www.feantsa.org>, last accessed on 16 January 2014.

therefore important to emphasise that it is not enough to simply distinguish between sleeping rough and living in well-suited housing when establishing whether or not the criminalisation of illegal stay has a negative impact on the living conditions of undocumented migrants.

In the Netherlands, under the Immigration Act 2000 and the Social Support Act undocumented migrants do not qualify for benefits and allowances from either national or local authorities, although they do have the right to basic medical care and minors have the right to education.[9] The law formally excludes undocumented migrants from qualifying for social housing because housing associations are legally obliged to ask potential tenants for proof of legal residence e.g. a passport or a residence permit.[10]

According to the WODC report, most undocumented migrants live in accommodation provided by relatives, friends or acquaintances or in accommodation rented via the private market. The latter form of accommodation is usually sublet social housing or private housing and may be an entire house, a room or even simply a bed. Rack-renters are not uncommon.[11] In most cases the living conditions of undocumented migrants not living with relatives or friends are very poor;[12] they are unhygienic with bad sanitary facilities, they are a fire hazard, they are located in rundown neighbourhoods and the rent is excessive.[13]

The WODC report does not specify the number of undocumented migrants actually having to sleep rough. It is however clear that it is very difficult for undocumented migrants to gain access to facilities such as temporary shelters.[14] Although a limited number of municipal authorities receive money from the national government to establish shelters or other accommodation for the homeless, many municipal authorities apply very strict conditions for access to such facilities; legal residence being a common condition.[15] Furthermore, accommodation for the homeless is generally maintained by non-governmental organisations (NGOs) often depending on the municipal authorities for funds. In most cases these subsidies are only granted if the NGOs apply the same aforementioned strict access conditions.[16] *If* undocumented migrants do have access to shelter this is

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9 See Article 10 of the Aliens Act 2000 and Article 8 of the Social Support Act.

10 Beenakkers, Kromhout & Wubs 2008, p. 24; Rusinovic (et al), Nieuwe vangnetten in de samenleving. Over problemen en dilemma's in de opvang van kwetsbare groepen, Rotterdam: Risbo 2002 p. 24-25.

11 R. van Parys & N. Verbruggen, Report on the housing situation of undocumented migrants in six European countries: Austria, Belgium, Germany, Italy, the Netherlands and Spain, Picum 2004 p. 15; Beenakkers, Kromhout & Wubs 2008, p. 25.

12 Beenakkers, Kromhout & Wubs 2008, p. 26.

13 Beenakkers, Kromhout & Wubs 2008, p. 26.

14 Van Parys & Verbruggen 2004, p 27.

15 One example is an order of the City Council of Amsterdam of 31 December 2010.

16 Parys & Verbruggen 2004, p. 35.

almost exclusively night shelters in respect of which less stringent access conditions apply.[17] In view of the above, the housing of most undocumented migrants in the Netherlands can be referred to as instable or inadequate according to the ETHOS typology.

2.2 The Dutch bill on the criminalisation of illegal stay

The Dutch bill essentially makes illegal stay a minor offence punishable by a maximum fine of € 3900.[18] Offenders who do not pay this fine can be imprisoned as alternative punishment.[19] The government aims to provide a low-threshold legal instrument as a strong deterring signal that illegal stay is not accepted in the Netherlands, is regarded as a violation of the public order and is a punishable offence.[20] However, it is not the government's intention that investigations to trace the whereabouts of undocumented migrants be intensified in response to the bill.[21] Undocumented migrants will therefore continue to be discovered during the regular investigations of the Immigration Police. Indeed the only real change after the bill has been enacted will be that once discovered undocumented migrants can be prosecuted before the responsible authorities have undertaken any legal measures under administrative law such as the imposition of a minor entry ban. Under current criminal law, only illegal stay contrary to such a measure is punishable.

Another important element of the bill is that a major entry ban can be imposed on undocumented migrants who continue to stay in the Netherlands after having been punished already because of their illegal stay and who after that violate a minor entry ban or vice versa.[22] The relevance of the possibility to impose a major entry ban is that a violation of this ban is a major offence while illegal stay will become a minor offence.[23] In the Netherlands, complicity in a minor offence is not punishable and, therefore, only people who comply in a major offence can be criminally liable.[24] This distinction is important because the possibility of being held criminally liable for contributing to illegal stay might affect the extent to which people are prepared to provide undocumented migrants with housing.

Finally, it is important to observe that under current criminal law it is, for example, already a major offence to smuggle people into the Netherlands and to provide undocumented migrants with housing with a profit motive

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17 Beenakkers, Kromhout & Wubs 2008, p. 27 and 71; Parys & Verbruggen 2004, p. 26.
18 *Kamerstukken II* 2012/13, 33 512, nr. 2.
19 *Kamerstukken II* 2012/13, 33 512, nr. 3, p. 14 (Explanatory Memorandum).
20 *Kamerstukken II* 2012/13, 33 512, nr. 3, p. 3 (Explanatory Memorandum).
21 *Kamerstukken II* 2012/13, 33 512, nr. 3, p. 16 (Explanatory Memorandum).
22 *Kamerstukken II* 2012/13, 33 512, nr. 3, p. 2 (Explanatory Memorandum).
23 See Article 197 of the Dutch Penal Code.
24 See Article 52 of the Dutch Penal Code.

or employment.[25] The same applies to complicity in these offences. As will become clear below, the prohibitions under criminal law do not mean the offences are no longer committed. It would be an illusion to think that undesirable behaviour can be completely prevented by promulgating criminal law. Indeed that certain acts are performed towards undocumented migrants despite the fact that these are illegal is highly relevant to the question of what the impact of criminalising illegal stay might be.

2.3 The expected impact of the criminalisation of illegal stay on the living conditions of undocumented migrants

The expected impact of the criminalisation of illegal stay on the living conditions of undocumented migrants can be divided into roughly three categories. The *first category* comprises the expected impact in terms of (the behaviour of) undocumented migrants themselves. It is highly questionable whether undocumented migrants will refrain from renting private commercial housing out of fear for discovery following a tip by the landlord or, for example, the neighbours after the enactment of the bill. Indeed, in the current situation undocumented migrants already constantly run the risk of being picked up and expelled on grounds of their irregular status but this risk still does not deter many undocumented migrants from continuing to stay in poor living conditions in the Netherlands. It is difficult to see why they would no longer do so once their illegal stay becomes criminal and punishable.

That the criminalisation of illegal stay would probably not have a very deterrent effect on undocumented migrants is also implied in the WODC report. Many undocumented migrants do not even seem to be aware that they qualify for basic medical care[26] and although non-take-up is partly out of fear, ignorance of the law is certainly not a factor to be underestimated.

Finally, in theory the fact that the criminalisation of illegal stay will not lead to increased efforts on the part of the Immigration Police to track down undocumented migrants means the chances of undocumented migrants being discovered will not increase. This part of the bill cannot therefore be expected to have a deterring influence on migrants making choices with regard to housing.

The *second category* comprises the impact on people assisting foreign nationals to stay in the Netherlands. Although assisting illegal stay will not become a punishable offence, assisting in the violation of a major entry ban *will*. Anyone providing an undocumented migrant who has been given a major entry ban with housing runs the risk of being prosecuted and punished

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[25] See Article 197a and 197b of the Dutch Penal Code; *Kamerstukken II* 2012/13, 33 512, nr. 3, p. 9 (Explanatory Memorandum).

[26] Beenakkers, Kromhout & Wubs 2008 p. 4.

by a prison sentence of up to four months.[27]

If it was only fraudulent rack-renters providing private commercial housing it would be questionable whether the criminalisation of illegal stay would have any impact on this category. After all, renting out housing for profit to undocumented migrants is already punishable by up to four years imprisonment.[28] However, housing is also rented out by organisations, relatives, and acquaintances of undocumented migrants out of a non-profit motive.[29] Legally these contributors could become co-perpetrators or accomplices to a major offence. It should however be stressed that in the current situation many people already appear to be convinced that the mere act of taking in their illegal relatives is a major crime.[30] Yet this conviction does not deter many people from doing so.

The *third category* comprises the impact of a possible concurrence of the criminalisation of illegal stay and positive obligations that may be imposed upon national and local governments by provisions on housing contained in human rights treaties. Indeed, insofar as such a provision applies in an individual case the Wet werk en bijstand (Dutch National Assistance Act (Wwb)) allows for deviation from the principle of linking eligibility for benefits to residency status.[31]

The positive obligations of national and local authorities enshrined in Article 27 of the Convention on the Rights of the Child (CRC) and Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) only need short consideration. The former provides that every child at least has a right to adequate housing and the latter provides that everyone has the right to an adequate living standard and a good physical and mental health. Despite the fact that the Netherlands is party to both conventions, the Afdeling bestuursrechtspraak van de Raad van State (Dutch Supreme Court in administrative proceedings (ABRvS)) ruled that Article 27 of the CRC is too vague to be directly applicable in individual cases.[32] Following a ruling by the *Centrale Raad van Beroep* (Dutch Central Appeals Tribunal for public service and social security matters) in 2008, the same applies to Articles 11 and 12 of the ICESCR.[33]

Invoking Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) *can* be effective. This article contains

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27 See Article 49 paragraph 1 and Article 197 of the Dutch Penal Code.

28 See Article 197a paragraph 2 of the Dutch Penal Code.

29 Rusinovic (et al) 2002, p. 25.

30 Van Parys & Verbruggen 2004, p. 15.

31 Article 8 paragraph 2 of the Social Support Act.

32 Afdeling bestuursrechtspraak van de Raad van State 15 February 2007 (Centraal Orgaan opvang asielzoekers v A and B) LJN AZ9524, Jurisprudentie Vreemdelingenrecht 2007, 144.

33 Centrale Raad van Beroep 22 December 2008 (Appellant v Municipal Executive of Amsterdam) LJN BG8776, Jurisprudentie Wet, Werk en Bijstand 2009, 52.

a right to respect for one's private and family life. The European Court of Human Rights (ECtHR) has ruled that this right can be of significance for the expenditure of public funds and that children and vulnerable persons have a right to protection. However, governments have a very broad margin of appreciation and the ECtHR attaches importance to the residence status of the individuals in question[34]. It could be argued, therefore, that the government has a duty to provide undocumented migrants with shelter only in very exceptional circumstances. One consequence of a successful appeal to Article 8 of the ECHR could be that undocumented migrants may not be punished harshly because of their illegal residence. Otherwise truly effective access to the ECHR cannot be ensured.

To conclude, we can justifiably argue that the criminalisation of illegal stay in the Netherlands will not have a negative impact on the living conditions of undocumented migrants in the Netherlands. Neither will concurrence between the offence of illegal stay and a positive obligation on the part of the government make it impossible to prosecute undocumented migrants due to their illegal stay in the Netherlands or require the government to provide these foreign nationals with shelter.

3 The United Kingdom

In research conducted in 2009, the number of undocumented migrants in the United Kingdom at the end of 2007 was estimated at between 533,000 and 719,000, of which some are asylum seekers.[35] Illegal stay in the UK has been punishable for some several decades. Article 24 of the Immigration Act 1971 distinguishes between illegal residence by illegal entry and illegal residence by overstaying.[36] Overstaying means staying longer in the UK than is permitted by a residence permit. This distinction has no consequences for the sentence because both kinds of illegal stay can be punished by imprisonment of up to six months, a fine of up to £5000 or both.[37] It is important to make two remarks about Article 24 of the Immigration Act 1971. First, this article comprises more offences than just illegal stay and therefore the maximum sentences in the Netherlands and the UK cannot easily be compared. Secondly, it appears that in practice Article 24 is a very unused article. Moreover, the Home Office tends to use its administrative

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34 ECHR 27 May 2008, 26565/05 (N. v the United Kingdom).

35 Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK, Greater London Authority 2009 (available on <www.london.gov.uk>, last accessed on 16 January 2014) p. 48.

36 D. Kostakopoulou, Trafficking and smuggling in human beings: the British perspective, in: E. Guild & P. Minderhoud (eds.), Immigration and criminal law in the European Union. The legal measures and social consequences of criminal law in member states on trafficking and smuggling in human beings, Leiden: Martinus Nijhoff 2006, p. 352.

37 For the fine see Article 37 paragraph 2 of the Criminal Justice Act 1982.

competences to expel undocumented migrants because the administrative procedures are faster, more flexible, and less impeded by procedural safeguards.[38]

The law regarding social assistance in case of homelessness is not consistent throughout the UK and since England comprises the bulk of the UK territory in Europe and has the most inhabitants it is most interesting to consider the situation in England. In England, local councils bear the responsibility for local homelessness affairs and these councils have a legal obligation under the Housing Act 1996 to assist people who are homeless or who will become homeless. As in the Netherlands, to receive assistance people should meet several conditions. Insofar as no human rights are violated only people who are *eligible for assistance* can qualify for benefits such as social housing.[39] One of the conditions for being eligible for assistance is having lawful residence within the territory of the UK. Therefore, undocumented migrants cannot but non-rejected asylum seekers and refugees *can* be eligible for assistance.

Maintaining shelters for the homeless is a responsibility that rests upon the shoulders of charitable institutions and local churches.[40] Although the capacity of such shelters is often limited and undocumented migrants generally have no access it appears that this impediment does not completely refrain all undocumented migrants from successfully appealing to homelessness assistance.[41]

Due to the limited access to social assistance, undocumented migrants depend on charitable institutions, relatives, friends, acquaintances, and private commercial housing for finding shelter. A research conducted by the British Government reveals that in the autumn of 2012 every day approximately 2300 undocumented migrants had to spend the night sleeping rough.[42] This number is only a tiny part of the hundreds of thousands of undocumented migrants staying in the UK and, therefore, the only conclusion that can be drawn is that the bulk of the undocumented migrants have housing other than on the streets, in homeless shelters, or social housing. Moreover, it could be argued that the vast majority of the undocumented migrants stays with relatives or friends or in private commercial housing. One final

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38 Kostakopoulou 2006.

39 This information can be found on <www.housing-rights.info>, <www.gov.uk/housing-benefit/eligibility> and <england.shelter.org.uk>, last accessed on 16 January 2014.

40 This information can be found on <england.shelter.org.uk>, last accessed on 16 January 2014.

41 This information can be found on <england.shelter.org.uk>, last accessed on 16 January 2014.

42 *Rough Sleeping Statistics England - Autumn 2012 Experimental Statistics*, Department for Communities and Local Government 2012 (available on: <www.gov.uk/government/publications/rough-sleeping-in-england-autumn-2012>, last accessed on 16 January 2014).

note should be that pursuant to Article 25 of the Immigration Act 1971 it is forbidden to assist with a violation of immigration law so those who provide undocumented migrants with housing run the risk of criminal prosecution. Still, it appears that most of the undocumented migrants possess some kind of housing despite the risk of prosecution and the poor living conditions they have to accept.

4 Germany

As is the case in the United Kingdom, illegal entry and illegal stay has been punishable in Germany for a long time. Pursuant to §95 and §98 of the Residence Act, anyone who stays in Germany without a valid residence permit or passport can be punished by imprisonment of up to one year or an administrative fine of up to € 3000 that can be imposed on anyone who negligently violates §95.

Just like Article 24 of the Immigration Act 1971, §95 of the Residence Act is a provision that comprises many other offences besides the offence of illegal stay and it is justified to assume that the specific sentence will be adapted to the specific offence. Strikingly, otherwise than in the UK §95 is actually enforced.

From research conducted in 2012 it emerges that the number of punishable undocumented migrants in Germany in 2010 should be estimated at between 140,000 and 340,000.[43] As far as housing is concerned, the situation appears to be very similar to the situation in the Netherlands and in England. Moreover, many undocumented migrants stay with relatives or friends or rent, alone or with others, private commercial housing while only a small number of undocumented migrants has to sleep rough or stays in squatted premises.[44] As is the case in England and the Netherlands, undocumented migrants cannot qualify for social housing and in Germany the reason for this is that the claimant must be registered in the municipal inhabitants register, the *Einwohnerregister*, which is impossible for undocumented migrants.[45]

Although it is forbidden by law to assist with illegal stay, providing undocumented migrants with help out of a humanitarian motive is *not* punishable in Germany.[46] In contrast, landlords are legally obliged to

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43 J. Schneider, *Pratical measures for reducing irregular migration. Research study of the European Migration Network (EMN)*, Federal Office for Migration and Refugees 2012 (available on <www.bamf.de/EN/Infothek/Publikationen/publikationen-node.html>, last accessed on 16 January 2014) p. 82; *Germany - national report. Housing solutions for people who are homeless*, FEANTSA 2008 (available on<www.feantsa.org>, last accessed on 16 January 2014).

44 Van Parys & Verbruggen 2004, p. 20 and 43.

45 Van Parys & Verbruggen 2004, p. 25.

46 Annual policy report 2012 by the German National Contact Point for the European Migration Network (EMN), EMN 2012 (available on <www.bamf.de>, last accessed

make sure their tenants are registered in the *Einwohnerregister* and that is why many undocumented migrants rent housing via the black market. Furthermore, lessors tend to offer only poor and expensive housing in poor neighbourhoods because they know undocumented migrants often have no option but to accept such poor housing that is cheap for the landlord to maintain.[47]

Social security benefits such as long-term shelters are only available to people who reside lawfully in Germany and subsidies provided by the government to organisations that support the homeless may not be used to offer undocumented migrants long-term accommodation.[48] However, undocumented migrants *do have* access to night shelters because as a rule no identification requirements apply for such shelters. During the winter it is common practice for lawful residents to be given priority due to the limited capacity of night shelters.[49]

As a final remark it is interesting to note that the number of undocumented migrants in Germany seems to be significantly lower than the number of undocumented migrants in the UK although Germany has more inhabitants. In both countries illegal stay is punishable so the difference cannot be explained by a difference in criminal law. The difference may be explained by the methods used to enforce the specific criminal law provisions but such strong statements cannot be made here. In any case, it could be concluded that undocumented migrants in Germany tend to stay with family or friends or rent private commercial housing on the black market and the latter indicates that, at least in some respects, the combination of the legal rules does effect the housing of undocumented migrants. Undocumented migrants are often forced to pay high rent for poor housing. The homelessness of undocumented migrants in Germany within the meaning of the ETHOS typology is thus increased by the law as a whole and this increase should not be seen as the sole result of a criminalisation of illegal stay in Germany.

5 Conclusion

It has been shown that the impact of the criminalisation of illegal stay on the living conditions of undocumented migrants in the three countries examined cannot reasonably be considered with reference to this criminalisation alone because it emerges that in each of the three countries the criminalisation of illegal stay forms part of a combination of criminal and administrative rules aimed at preventing and combatting illegal stay.

on 16 January 2014) p. 39.

47 Van Parys & Verbruggen 2004, p. 20.

48 Van Parys & Verbruggen 2004, p. 33.

49 Van Parys & Verbruggen 2004, p. 33.

When the whole combination of legal rules and the impact of these rules in the United Kingdom and Germany are considered it appears that in both countries undocumented migrants often stay at the houses of their relatives or friends or they hire poor and expensive private commercial housing. Their living conditions could, therefore, be described as unstable or inadequate housing within the meaning of the ETHOS typology. This finding cannot easily lead to the conclusion that the criminalisation of illegal stay in the Netherlands will raise the same problems concerning housing for undocumented migrants and two reasons can be given for this.

Firstly, undocumented migrants in the UK and Germany do not seem to refrain from renting private commercial housing out of fear of discovery. It is highly probable that the same will be true for undocumented migrants in the Netherlands once illegal stay is punishable because undocumented migrants already willingly run the continuous risk of being discovered and expelled and despite this risk an estimated 100,000 undocumented migrants stay in the Netherlands. Moreover, undocumented migrants in the Netherlands live in similar conditions as do their counterparts in Germany and the UK.

Secondly, because the criminalisation of illegal stay in the Netherlands will result in a new minor offence, complicity to illegal stay as such will not be punishable and, therefore, people who contribute to illegal stay out of a motive other than a profit will not be deterred from doing so. Indeed, relatives of undocumented migrants now believe that providing undocumented migrants with housing is illegal but such a conviction does not deter these relatives from taking them in. Furthermore, the risk of being prosecuted for assisting with the violation of a major entry ban will probably not have much effect on lessors since letting out housing to undocumented migrants for profit is already illegal under Dutch law but still takes place.

Given that the living conditions of undocumented migrants in the United Kingdom and in Germany are generally poor and that these living conditions are very similar to those of undocumented migrants in the Netherlands we are justified in concluding that the living conditions of undocumented migrants in the Netherlands will not necessarily deteriorate following the criminalisation of illegal stay. However, neither will they improve. Neither is there any evidence to suggest that the criminalisation of illegal stay (in the Netherlands) will have a negative impact on the living conditions of undocumented migrants where these are currently favourable.

Finally, the possibility for undocumented migrants to claim the right to shelter under the provisions in Article 8 of the ECHR rather than being punished is not very important since only vulnerable undocumented migrants such as minors can successfully invoke this article.

Part V
Human rights responses and access to justice

Chapter 14
The Effectiveness of EU Law in Protecting Housing Rights in the Area of Credit Agreements Relating to Residential Property

Jochem de Kok

1 Introduction

In 2012, the United Nations Committee on Economic, Social and Cultural Rights expressed its deep concern about the situation of individuals and families who find themselves overwhelmed by housing costs after taking out long-term mortgages, a situation which has caused many to lose their homes and placed others at high risk of losing theirs.[1]

The 2008 Financial Crisis sent countries into exceptionally sharp recessions, resulting in higher levels of unemployment across almost the entire European Union. The economic crisis has been particularly severe in the periphery, where many borrowers have found their loans increasingly unaffordable, with defaults and forced sales rising.[2]

Housing foreclosure rates have been especially high in Spain, where more than 350,000 houses have been foreclosed since 2007, and in 2011 approximately 212 foreclosures and 159 evictions occurred daily.[3] In Italy, the number of families unable to make mortgage payments had risen to an alarming level of one in four.[4] High default and foreclosure rates all around Europe are aggravating strain on economic recovery and exacerbating homelessness issues, as many have had to leave their homes while remaining in debt to banks.[5]

More than 70 per cent of all households in the EU today live in a home

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1 UN, Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Spain, E/C.12/ESP/CO/5, 6 June 2012, Available at <www2.ohchr.org/english/bodies/cescr/cescrs48.htm>.

2 Proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property, 2011/0062 (COD), preamble recital 5.

3 UN General Assembly, A/67/286, The right to adequate housing, 10 August 2012 at <www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf>; A. Colau & A. Alemany, *Vidas Hipotecadas*, Barcelona: Angle Editoriál-Cuadrilátero Libros 2012, p. 21-22.

4 EU Employment and Social Situation Quarterly Review, June 2012 issue, p. 44.

5 Houses often sell for a fraction of the original loan. The residual debt remains a liability that needs to be paid back to the bank. (OJ C241 E, 22.8.2013, p.29).

that they own, and one-quarter of all households have a mortgage.[6] While households with a mortgage are less exposed to poverty risk,[7] the risk of poverty has been on the rise among a considerable group of people who are increasingly exposed to risks due to their vulnerability on the labour market.[8]

The right to adequate housing is a universal right, recognised at the international level in inter alia, the Universal Declaration of Human Rights[9] and the International Covenant on Economic, Social and Cultural Rights.[10] Under the Charter of Fundamental Rights of the European Union, which forms an integral part of the EU legal order and has the same legal value as the Treaties,[11] the EU recognises and respects the right to social and housing assistance.[12] In the context of the Council of Europe, the right to housing is protected in the European Social Charter, particularly in the Revised European Social Charter, which requires its Parties to promote access to housing of an adequate standard, to prevent and reduce homelessness and to make the price of housing accessible to those without adequate resources.[13] Housing Rights may also be derived from the European Convention on Human Rights, on which the European Court of Human Rights has issued a substantial amount of judgments.[14] As the EU is founded on the value of respect of human rights, it must ensure housing rights in its legislation.[15]

While supporting housing rights at an international level, many States have failed to address these rights within national legislation.[16] The lack

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6 N. Teller, 'Housing and Homelessness', in: E. O'Sullivan, D. Quilgars & N. Pleace (eds), *Homelessness Research in Europe, Festschrift for Bill Edgar and Joe Doherty*, Brussels: FEANTSA 2012, p. 86.

7 The percentage of mortgage-holding households living under the poverty line is 12.2, as opposed to their total housing market share of 27 per cent.

8 Teller 2012, p.86, 94; See also B. Edgar, J. Doherty & H. Meert, *Access to Housing, Homelessness and Vulnerability in Europe*, Bristol: Policy Press 2010.

9 Universal Declaration of Human Rights, 1948, Article 25.

10 International Covenant on Economic, Social and Cultural Rights, Article 11(1).

11 Treaty on the European Union (OJ 2010, C 83, 30.3.2010, p.1), Article 6.

12 Charter of Fundamental Rights of the European Union (OJ 2000, C 364, 18 December 2000 p. 1).

13 Council of Europe, European Social Charter (revised), Strasbourg, 3.V.1996, Article 31; Council of Europe, European Social Charter, Turin, 18.X.1961, Article 16.

14 FEANTSA Database of Decisions of the European Court of Human Rights relating to housing rights, <feantsa.horus.be/code/EN/pg.asp?Page=695>. For the application of Article 8 in foreclosure proceedings see S. Nield & N. Hopkins, *Human rights and mortgage repossessions: beyond property law using Article 8, Legal Studies* 2013(33), No.3, p.432-453.

15 Treaty on the European Union (OJ 2010, C 83, 30.3.2010 p.1), Articles 2 and 6; Communication from the Commission, Compliance with the Charter of Fundamental rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring, COM(2005) 172 final, 27.5.2005.

16 Council of Europe, *Housing Rights: The Duty to Ensure Housing for All*, Strassbourg, 25 April 2008; Teller 2012, p. 85.

of state responsibility in the housing market has generated increased housing vulnerability.[17] Banks, as credit granting institutions and holders of mortgages, thus have an exceptionally powerful position in society. While on the one hand, banks have the right to foreclose property in case of creditor default, the exercise of such right often has far reaching consequences on both the individuals involved and society as a whole. For instance, in Greece, the sharp increase of housing foreclosures has rendered thousands of Greeks homeless, and has created the tragic phenomenon of the 'new homeless.'[18] The Greek case has shown how housing foreclosure often results in homelessness for those involved. An effective legal framework is therefore essential in order to balance the protection of the individual's housing rights and the right to foreclose a property in case of default.

This chapter seeks to answer the following question: Does EU Law Provide for Effective Protection of Housing Rights in the Area of Credit Agreements Relating to Residential Property?

When answering this question this chapter seeks to expand upon previous research[19] and to increase knowledge of European regulation in the area of residential mortgage agreements.

The chapter will first discuss substantive rights under EU law that seek to protect consumers from becoming victims of unfair credit agreements. To this end it will discuss EU Consumer Protection Directives and the Mortgage Credit Directive, which was recently adopted by the European Parliament.[20] Subsequently, the article will discuss to what extent EU law can protect procedural rights that ensure access to justice during debt collection and foreclosure proceedings.

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17 Teller 2012, p. 85.

18 Notice, Written questions by Members of the European Parliament and their answers given by a European Union institution (OJ C 220 E, 1.8.2013, p.173).

19 See tot his end suggestions for future research topics on Teller 2012, pp.99-100.

20 Proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property, 2011/0062 (COD); note that while the proposal has recently been adopted by the European Parliament, the directive has not yet been published in the OJ, this will happen after the Council agrees on the correlation tables for transposition into national law, this official vote is a formality and it is highly unlikely that the text will change from its present format. See Commission Memo 13/1126 'Commissioner Barnier welcomes the European Parliament's adoption of new rules on mortgages', Brussels, 10 December 2013; Commission Memo 13/1127, 'Creating a fair single market for mortgage credit - FAQ', Brussels, 10 December 2013. (Hereafter: MCD).

2 Substantive Rights

2.1 Consumer Protection Directives

The European Union has adopted several directives with regards to consumer protection.[21] While Directive 2008/48/EC on Credit Agreements for Consumers specifically excludes mortgage agreements from its scope,[22] the Directive 2005/29/EC on Unfair Commercial Practices (UCPD)[23] and Directive 93/13/EEC on Unfair Terms in Consumer Contracts (UTCCD) do apply to mortgage agreements.[24]

Although the UCPD specifically mentions that, by reason of their complexity and inherent serious risks, financial services and immovable property necessitate more detailed requirements,[25] the Directive is applicable to mortgage agreements and thus provides protection for consumers against unfair commercial practices in the area of mortgage agreements. The directive specifically protects consumers against unfair commercial practices, misleading commercial practices and aggressive commercial tactics.

The UTCCD seeks to protect the economic interest of consumers by protecting them against the abuse of power by the seller or supplier, in particular against one-sided contracts and the unfair exclusion of essential rights in contracts.[26] Under the UTCCD, consumers will not be bound by unfair terms,[27] and will have the right to take action to prevent the continued use of the unfair term.[28]

The Court of Justice of the EU has recently confirmed in Case C 415/11 *Aziz* that the UTCCD is applicable to mortgage agreements.[29] The Court ruled that the UTCCD precludes national legislation that does not allow for national courts to adopt interim measures in mortgage foreclosure proceedings where they impair the effectiveness of the rights conferred on consumers in the UTCCD.[30] Considering the nature of preliminary rulings, the Court did not

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21 Opinion of the European Central Bank of 22 May 2013 on Mortgagor Protection (CON/2013/33), p .2.

22 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (OJ L 133, 22.5.2008, p. 66), Article 2(2)(a).

23 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p.22), recital 9. (Hereafter: UCPD).

24 Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29) (hereafter: UTCCD).

25 UCPD, recital 9.

26 UTCCD, preamble.

27 UTCCD, article 6(1).

28 UTCCD, article 7(2).

29 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013] not yet published.

30 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 64.

have jurisdiction to assess whether the mortgage agreement constituted an unfair agreement. The procedural aspects of the *Aziz* case will be examined in further detail below.

While European Consumer Law applies to mortgage agreements, the exact scope to which it seeks to protect consumers from unfair mortgage agreements is unclear, as there exists virtually no jurisprudence on this issue. Furthermore, while the UTCCD and UCPD protect consumers against unfair mortgage agreements and unfair commercial practices respectively, the Directives do not protect housing rights as such.

In the context of efforts to create an internal market for mortgage credit and against the background of the financial crisis, the European Parliament has recently adopted the Directive on credit agreements relating to residential immovable property (Mortgage Credit Directive (MCD)).[31] The question thus arises whether this recently adopted Directive grants increased protection of the housing rights in the area of credit agreements relating to immovable property.

2.2 Mortgage Credit Directive

Financial regulation is currently undergoing major reform. The Single Supervisory Mechanism will bring banks under the supervision of the ECB,[32] and the proposed Single Resolution Mechanism will grant resolution powers to the Single Resolution Board in order to resolve bank failures at a European level.[33] The regulation of immovable property credit agreements is one of the areas of financial law being currently reformed. While social protection and welfare policies are matters of competence of the individual member states,[34] the harmonisation of national laws falls within the jurisdiction of the EU.[35] In view of the issues brought to light in the financial crisis, the EU has recently adopted the Mortgage Credit Directive.[36]

The MCD on mortgage agreements was accompanied by an impact assessment, which identified a series of problems in EU mortgage markets

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31 MCD, recital 5, supra note 20.

32 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, (OJ L 287, 29 October 2013, p.63).

33 Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, Brussels, 10.7.2013 COM(2013) 520 final.

34 Notice, Written questions by Members of the European Parliament and their answers given by a European Union institution (OJ C 219, 31.7.2013, p.95).

35 Treaty on the Functioning of the European Union (OJ C 84, 30 March 2010, p.47), Article 114.

36 Supra note 20.

associated with irresponsible lending and borrowing at the pre-contractual stage.[37] The impact assessment identified the following problems in the pre-contractual stage: 'non-comparable, unbalanced, incomplete and unclear advertising materials; insufficient, untimely, complex, non-comparable and unclear pre-contractual information; inappropriate advice; and inadequate suitability and creditworthiness assessments.'[38]

The objective of the proposed Directive on mortgage agreements is to ensure that all consumers benefit from a high level of protection in the area of mortgage agreements.[39] The Directive aims to reduce the likelihood of consumers purchasing an unaffordable product, which could potentially lead to over indebtedness, default and eventually foreclosure.[40] For the purposes of this article, the Directive improves customer protection in two important ways:[41]

Firstly, in order to increase transparency and prevent abuse arising from possible conflicts of interest, the lender should provide general and personalised information to the consumer.[42] The relevant information, as well as the essential characteristics of the product involved must be explained in a personalised manner so that the consumer can understand the effects the agreement might have on his economic situation.[43]

Secondly, the lender should make a credit assessment, taking into consideration all necessary factors that could influence a consumer's ability to repay over the lifetime of the loan.[44] A negative assessment results in rendering the creditor unable to grant the loan.[45]

The Mortgage Credit Directive certainly improves the 'high level of consumer protection' in the area of mortgage agreements, but only does so to a limited extent. While the Directive is likely to protect customers from becoming victim of an unfair mortgage agreement, the directive does not directly improve housing rights of housing owners nor does it grant protection during foreclosure proceedings.

All in all, the UCTD, UTCCD and MCD do not protect housing rights

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37 MCD, preamble 4.

38 MCD, preamble 4.

39 MCD, preamble 9.

40 MCD, preamble 4.

41 Other aspects include conduct of business obligations, advertising and marketing and complaint and redress mechanisms.

42 MCD, preamble 20-23; Commission Recommendation 2001/193/EC on pre-contractual information to be given to consumers by lenders offering home loans (OJ L 69, 10.3.2001, p.25).

43 MCD, preamble 22, 31; Commission Recommendation 2001/193/EC on pre-contractual information to be given to consumers by lenders offering home loans (OJ L 69, 10.3.2001, p.25).

44 MCD, preamble 24-27.

45 MCD, preamble 25.

as such, but aim to prevent consumers from entering into and suffering from unfair mortgage agreements. Once the fairness of the agreement has been established, EU law does not provide any further substantive rights. EU law therefore only offers a limited degree of substantive housing rights protection. Once the fairness has been established, EU law does not restrict the circumstances under which the financial institution can commence mortgage foreclose proceedings. It is therefore important that EU citizens enjoy procedural rights to fully ensure housing rights in the area of foreclosure proceedings.

2.3 Procedural Rights

There is no European legislation on debt settlement and foreclosure proceedings. Thus in the absence of harmonisation of national enforcement procedures at European Union level, such procedural rules remain a matter for the national legal orders, in accordance with the principle of procedural autonomy.[46] However, national procedures may not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by European Union law and national procedures concerning European law may not be less favourable than those governing similar domestic action.[47]

In Case C-415/11 *Aziz*, the Court was able strike down a national measure preventing the use of interim measures in foreclosure proceedings based on the principle of effectiveness. In that case, the Spanish rules of procedure did not allow the court hearing declaratory proceedings linked to mortgage enforcement proceedings to adopt interim measures where the consumer challenged the fairness of the mortgage agreement in the light of the UTCCD.[48] Whether such a national procedural provision makes the application of European Union law impossible or excessively difficult in the light of the principle of effectiveness must always be analysed 'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies.'[49]

For this purpose, the Court considered that under the Spanish rules of procedure, the final vesting of mortgaged property in a third party is always irreversible, even if the unfairness of the term challenged by the consumer

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[46] Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013] not yet published, paragraph 50; Case - 618/10 Banco Español de Crédito [2012] ECR I0000, paragraph 39; Notice, Written questions by Members of the European Parliament and their answers given by a European Union institution (OJ C 220 E, 1.8.2013, p.100).

[47] These principles are referred to as the Principle of Effectiveness and Equivalence. See, for instance, Case C-618/10 (Banco Español de Crédito) [2012] ECR I0000, paragraph 39.

[48] Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 52.

[49] Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 53.

before the court hearing the declaratory proceedings results in the annulment of the mortgage enforcement proceedings, except where that consumer made a preliminary registration of the application for annulment of the mortgage before that marginal note.[50] According to the Court, however, there would be a significant risk that the consumer would not make that preliminary registration within the period prescribed for that purpose.[51]

The Court therefore held that 'such procedural rules impair the protection sought by the directive, in so far as they render it impossible for the court hearing the declaratory proceedings - before which the consumer has brought proceedings claiming that the contractual term on which the right to seek enforcement is based is unfair - to grant interim relief capable of staying or terminating the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of its final decision.'[52]

Such procedure would in effect mean that the consumer could only obtain protection in the form of compensation subsequent to the housing foreclosure. The Court held that such subsequent compensatory protection is incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of such unfair terms.[53]

> 'That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling.'[54]

The Court is thus sensitive to the fact that the property was the family home of Mr Aziz and that national procedures should make it possible to prevent the definite and irreversible loss of that home. While the Court does not speak of the right to housing, it does recognise the importance of a family home in the context of foreclosure proceedings.

The Court therefore decided that the UTCCD 'must be interpreted as precluding legislation of a member state, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings,

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50 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 57.
51 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 58.
52 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 59.
53 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 60.
54 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 61.

where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.'[55]

Aziz provides an important improvement in the housing rights of citizens in Spain. The judgment could also affect other member states where it is not possible to challenge the fairness of the mortgage agreement during the foreclosure proceedings, although the Court noted that such national procedures must be 'analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies.'[56]

Therefore, while procedural rules governing mortgage enforcement proceedings remain a matter for the national legal orders, national procedural laws must ensure the effectiveness and equivalence of substantive EU rights. Jurisprudence on this issue remains scarce and while the MCD improves substantive rights of consumers it does not harmonise national enforcement proceedings. There is no standard test under which the Court applies the principle of effectiveness or equivalence, and it is unclear how strictly the Court will apply this test in the area of mortgage credit agreements in other cases.

Considering the Europeanization of banking and financial law and supervision, the cross-border activities of financial institutions, the effects of foreclosures on the functioning of the internal market, the need for further harmonisation in the area of mortgage foreclosure proceedings must be addressed, in particular so as to ensure the fundamental right to housing.

The regulatory framework should be harmonised to provide incentives to all parties concerned to agree on a timely and reasonable debt restructuring in the event of a default so as to avoid foreclosure proceedings, while minimizing potential moral hazard.[57] For instance, lenders could be obliged to go through reconciliation or mediation procedures in order to find a reasonable, acceptable solution for all parties concerned. Time limitations for initiating foreclosure procedures could be imposed in order to allow the borrower sufficient time to find alternative housing and may help borrowers to settle outstanding payments or to come up with alternative payment measures.[58] And consumers could be granted a right to have their payment obligations suspended to bridge temporary economic difficulties. Such suspension of payment may be particularly important in cases of dismissal

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55 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 64, Operative Part 1.

56 Case C-415/11 (Mohamed Aziz v Catalunyacaixa) [2013], paragraph 53.

57 See also Opinion of the European Central Bank of 22 May 20130n Mortgagor Protection (CON/2013/33), p.2.

58 Such time limitations would, however, merely delay and do not prevent foreclosures. See: K. Gerardi, L. Lambie-Hanson & P.S. Willen, *Do borrower rights improve borrower outcomes? Evidence from the foreclosure process*, National Bureau of Economic Research, Working Paper 17666, 2011.

or where the property is a family home.[59]

Until such harmonisation takes place, member states should consider the results of the Staff Working Paper on National Measures and Practices to Avoid Foreclosure Procedures for Residential Mortgage Loans, which accompanied the proposed Directive on mortgage agreements.[60] While the working paper has no binding force, and merely provides an overview of the existing national measures that seek to avoid foreclosure procedures, the results might provide examples and guidance for national public authorities and creditors on how rising default rates have been addressed across the EU with measures to avoid foreclosure procedures.[61]

3 Conclusion

The Mortgage Credit Directive is likely to protect consumers from becoming victim of unfair mortgage agreements and the Consumer Protection Directives provides protection to those who have been become victims of an unfair agreement. However, once the fairness of the agreement has been established, EU law does not provide any further substantive rights. EU law therefore only offers a limited degree of substantive housing rights protection. Once the fairness has been established, EU law does not provide restrictions under which circumstances the financial institution can commence mortgage foreclose proceedings.

With regard to procedural protection in the area of foreclosure proceedings, such procedural rules remain a matter for the national legal orders in the absence of harmonisation at a European level. The national procedures must, however, ensure the effectiveness of EU law, including the effectiveness of the Consumer Protection and Mortgage Credit Directives.

The *Aziz* judgment provides a glimpse of hope for those undergoing mortgage foreclosure proceedings in Spain. The judgment, however, merely concerns one Spanish procedural law, and millions of homeowners across Europe are still living under a threat of eviction. The tragic phenomenon of the 'new homeless' in Greece is an example of the lack of protection of housing rights in the area of mortgage foreclosure proceedings.

It thus remains the task of the member states to balance the interests of the parties in mortgage foreclosure proceedings. However, considering the Europeanization of banking and financial law and supervision, the cross-

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59 For further practices to avoid foreclosures see Commission Staff Working Paper National measures and practices to avoid foreclosure procedures for residential mortgage loans, Accompanying document to the Proposal for a Directive Of The European Parliament And Of The Council on credit agreements relating to residential property, Brussels, 31.3.2011 SEC(2011) 357 final.

60 *Ibid*.

61 *Ibid*; Notice, Written questions by Members of the European Parliament and their answers given by a European Union institution (OJ C 220 E, 1.8.2013, p.100).

border activities of financial institutions, the effects of foreclosures on the functioning of the internal market, and the friction between foreclosure proceedings and the right to housing, the regulatory framework should be harmonised to provide incentives to all parties concerned to agree on a timely and reasonable debt restructuring in the event of a default so as to avoid foreclosure proceedings.

Chapter 15
Homelessness and access to justice in the UK

Anna Willis

1 Abstract

The central question that will be posed in this chapter concerns the concept of access to justice. I will focus on whether access to justice for the homeless and disadvantaged is attainable or whether society has made it so that it is merely an abstract concept, which is neither achieved nor understood. I will describe three issues that relate to access to justice in order to ensure fluidity and full understanding.

Unfortunately access to justice has not been universally defined. As such it has been left to independent organisations to state what they perceive the term to mean. Common opinion regarding this notion would be that it relates to access to the court system; the fundamental right that one can have his case heard before an independent judge and to let justice prevail. Although this is undoubtedly crucial in any democratic State, access to justice affects many people, and especially those who are disadvantaged such as the homeless, at a far more localised level. This includes the opportunity to obtain a quick, effective and fair response to protect your rights, prevent or solve disputes and control the abuse of power.[1]

As access to justice is a rather abstract term I will subdivide the chapter to deal with various issues. Firstly I will assess the role of local charities in providing a gateway for achieving access to justice. I currently volunteer at the Citizen's Advice Bureau (CAB) as a social policy adviser and I have observed how individuals are helped greatly by such organisations. This charity provides free and confidential advice to anybody in the community who are facing a problem in their lives. The role of the charity varies from helping to claim social assistance benefits, managing debt and signposting individuals to seek emergency accommodation. In addition they are instrumental in improving governmental policies. As part of the social policy department, employees observe trends within the community and suggest ways that can change the situation for those affected. These are then passed on to the London Head Office that lobbies the government for modified legislation. One of the most frequent issues that are noted by the CAB is

[1] UNDP Justice System Programme: Access to Justice Concept Note, February 2011.

discrimination against immigrants and its relation to homelessness.[2] I will use recent legislation and budget cuts to highlight the manner in which the CAB is affecting change as well as using my own experiences to demonstrate how charitable organisations are of paramount importance in ensuring access to justice at the most basic level.

Secondly, I will examine the way in which access to justice is being used at a higher level, most notably through the court system. My observations will be derived from the recent legal aid budget cuts and how this has affected the number of people who are eligible for legal aid, both in civil and criminal matters. There is wide consensus among lawyers that the cuts have resulted in the access to justice for many being restricted with it being stated that 'the damage caused to the justice system will be profound and irreversible'.[3] However, I will proceed to question whether there is more than one reason as to why access to justice has been restricted. This will involve consideration of other factors, including the one submitted by Zuckerman[4] who argues that some lawyers are creating and exploiting complexities in the system in order to benefit financially. In addition, I will consider the viewpoint that access to the court system is universally difficult and that the increase in the use of mediation and arbitration demonstrates the changing face of what access to justice really means in a modern society.

Finally, I will investigate a wider remit and consider whether homeless people are being discriminated against. I will then provide a narrower approach to observe whether this results in a more subtle obstacle to access to justice. I have collated information from various charities that deal with homelessness. Shelter and Crisis are two of the largest organisations of their kind which focus on homelessness and provide information and advice, as well as advocating for change.[5] One of the main areas that homeless people experience discrimination in is through the healthcare system; therefore I will investigate exactly how the system results in discrimination and solutions that have been offered by independent organisations. I will also use the 2013 House of Commons 'Homelessness in England' report[6] to assess the

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2 < www.citizensadvice.org.uk/> last accessed on 5 January 2013.

3 'Solicitors up in arms over legal aid changes' *The Lancaster Guardian*, 9 May 2013 <www.lancasterguardian.co.uk/news/lancaster-and-district-news/solicitors-up-in-arms-over-legal-aid-changes-1-5658766>, last accessed on 15 May 2013.

4 A. A. S. Zuckerman, 'Lord Woolf's Access to Justice: Plus Ca Change…', *Modern Law Review* 1996 (773), p. 3 <www.adrianzuckerman.co.uk/files/File/woolfmlr-jen.dr2.pdf>.

5 'The Housing and Homelessness Charity: Who we are,' <england.shelter.org.uk/about_us/who_we_are; last accessed on 01 December 2013>, 'The National Charity for Single Homeless people', <www.crisis.org.uk> last accessed on 01 December 2013.

6 W. Wilson, 'Homelessness in England,' Social Policy Section, Standard Note: SN/SP/1164, 19 April 2013, <www.citizensadvice.org.uk/index/aboutus/cab_key_facts.htm>.

various statutory mechanisms already in place for tackling discrimination against the homeless, as well as comparing the differences in local authority approaches. Thus it will involve assessing the social aspects surrounding homelessness but also observing as to whether there are any legal remedies to combat such discrimination.

I will then conclude the chapter by expressing my personal beliefs regarding these issues and argue both who is responsible and what can be done to ensure maximum accessibility of justice.

2 The role of local charities in providing access to justice

It will be useful to briefly explain the infra-structure of the CAB in order to fully understand its function. The Citizen's Advice is a registered charity with membership organisation for bureaux. *Together they make up the Citizens Advice service*. The CAB provides advice from over 3,300 locations within England and Wales and are run by 338 individual charities. Due to the CAB being a charity, funding is provided mainly by government grants. However, funding is also provided by local authorities, lottery funds, primary care trusts, charitable trusts, companies and individuals. The income of Citizens Advice totalled £77.5 million in 2012/13 and the framework consists of Trustees, Directors and the Executive Team.[7]

In regard to the personnel involved, approximately 28,500 people work for the service, over 22,000 of them are volunteers and nearly 6,500 are paid staff. Due to the high level of volunteers, the role of workers is not distinguished based on whether they are paid staff or volunteers. The role of the work varies from advising, to administration, IT support, press relations and trusteeship. The main role is that of advising, because this directly helps the client. Advisers can write letters and make phone calls to service providers on their clients' behalf. They can help people prioritise debts and negotiate with creditors. They can also refer clients to specialist case workers, who are able to represent people at court and tribunals. The relationship between the CAB and solicitors greatly depends on the individual centre and the level of co-operation exists. However, most CABs and solicitors wish to build a positive relationship because it helps both clients and the business of the solicitors because they can use the legal aid funding available. The CAB's tag line is 'the charity for your community', so therefore supplies advice and support for everyone.[8]

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7 Citizens Advice Bureau, 'Citizens Advice, 'Key facts about the Citizens Advice Service,' <www.citizensadvice.org.uk/index/aboutus/cab_key_facts.htm>, last accessed on 15 December 2013.

8 Citizens Advice Bureau, 'Citizens Advice, Key facts about the Citizens Advice Service', <www.citizensadvice.org.uk/index/aboutus/cab_key_facts.htm>, last accessed on 15 December 2013.

Within the CAB, one of the most common roles that a volunteer performs is as a gateway assessor. The aim is to help the client quickly and thus the adviser will have to assess the client's needs and then refer them to the most appropriate centre for their problem. This can be prompting the client to a specialised organisation or to see a CAB adviser. Either way, for many individuals this is their first step towards achieving justice. The advisers are impartial and their role can be crucial for ensuring that people are made aware of the various services available to them in order to enable them to solve their disputes and protect their rights. Furthermore, because the gateway assessments are short in duration, this allows the service to be accessible to the community in a wide scale manner.

Another role within the CAB is as an adviser. This is a more comprehensive meeting with the client to explain the options available to them. Advisers are trained in the subjects of social assistance benefits, housing issues, employment law and general money advice. Therefore they are in a strong position to explain and help the client with their problem. The most common form of help given by advisers includes filling out legal and administrative forms, sending letters and making phone calls on behalf of the client to professionals and assessing various welfare benefits.

These roles vary from being arguably rather simplistic to being technical and legal; however for a client who is confused by the legal and administrative procedure, all of these roles serve as a means of ensuring that people have access to justice. The fact that in 2011/12, the CAB dealt with 6.89 million enquiries[9] demonstrates the need of such services within the community. The CAB themselves have stated that the need is so high because of the level of vulnerability suffered by people due to lack of understanding and exploitation, which in turn increases the exposure to abuses of peoples' rights.[10] As stated above, CABs have links to local solicitors who perform legal aid work.[11] This acts as a next step for those who have to take their problem through the legal system. By the CAB providing a list of trusted solicitors, the client will feel more at ease with the process and thus access to justice is not restricted by a lack of understanding, confidence or support.

Apart from performing a practical role for individual clients, the CAB also has a social policy initiative which aims to both initiate change in legislation through lobbying, and communicating with the government about how changes in legislation will affect the general public. The recent Welfare Reform

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9 Citizen's Advice Bureau, 'RESPONSE FROM THE CITIZENS ADVICE BUREAU' regarding the UK Human Rights Bills, 1 October 2012, p. 1 <cbr.cjs.gov.uk/group-2/Citizens%20Advice%20Bureau.pdf>.

10 Citizens Advice Bureau 2012, p. 5.

11 Citizens Advice Bureau, 'Using a legal adviser'. <www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/using_a_solicitor.htm>, last accessed on 17 December 2012.

Bill and the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) involved detailed consultation with the CAB. For example, the LASPO Bill indicated dramatic cuts in the amount of legal aid that would be available and thus the CAB teamed up with the Law Society to launch the 'Access to Justice' campaign. This campaign involved talking to Members of Parliament from all over the country about the Bill and suggesting amendments in order to limit the scope of suffering that the Bill would entail.

Various concessions were made by the government due to this initiative, especially in regard to homelessness. These include the fact that legal aid will be available for serious housing repair issues and for issues relating to the loss of home.[12] Although the Act does include some very dramatic changes, the CAB were instrumental in affecting some change and with approximately 5.6 million people being helped through their social policy work in 2011/12,[13] it highlights the manner in which local charities are fundamental in ensuring access to justice both at a base level and at a national level. However, Gillian Guy, the Chief Executive of the CAB has stated that due to the fact that under governmental budget cuts the legal aid contract for the CAB will not be renewed, means that people will be without basic advice regarding how to approach or deal with their issues. She argues that 'the risk is that these individuals will not only be out of scope, but out of mind.'[14] Thus suggesting that access to justice is no longer a priority for the government. Furthermore, Shona Alexander, also an employee at the CAB, has stated that due to the financial restrictions she was forced to turn many people away and instead had to provide them with legal support packs in order for them to conduct their own legal proceedings.[15]

Additionally, it has been reported that the CAB anticipate a loss of £19m in annual income and as a result there have been many redundancies.[16] With legal aid cuts affecting the services that provide advice, individuals are likely to suffer more. Consequently access to justice will be restricted and people will be forced to attempt to solve their problems without any professional guidance, something which directly contradicts the notion of justice.

3 The limitations of access to justice in light of legal aid

Criminal legal aid has had a £220m financial cut, and in order to achieve such a drastic reduction in costs certain restriction have been imposed.

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[12] 'Citizens Advice Social policy impact report', 2011/12, p. 22.

[13] 'Citizens Advice Social policy impact report,' 2011/12, p. 2.

[14] Citizens Advice Bureau, *'Out of scope, out of mind: who really loses from legal aid reform,'* 6 March 2012 <www.citizensadvice.org.uk/press_20120306>.

[15] O. Bowcott, 'Commission to examine effect of legal aid cuts as demand for service surges,' *The Guardian Newspaper*, 03 December 2012.

[16] O. Bowcott, 'Legal aid cuts force closure of almost a third of Shelter offices,' *The Guardian Newspaper*, 11 March 2013.

For instance, people who earn in the excess of £37,500 will no longer automatically receive legal aid and there are plans to restrict the access to legal aid for housing issues, family law and social welfare debt. Furthermore, a price-competitive tendering process has been introduced in order to make the system more cost efficient.[17]

Despite these disadvantages to the new system, the government have highlighted its necessity. It is submitted that firstly there is a real need to save a large amount of money with government spending; secondly that the criminal justice system is in need of becoming more economic in order to survive the tough economical time; and that lastly the tendering process will enable services to be of a higher quality and of better value.[18] However, despite these justifications Lord Neuberger has stated that 'access to justice is of the essence in a civilised society[19]' and that these cuts prevent this basic right.

It is not only criminal legal cuts that have been commissioned; civil legal cuts have also seen dramatic reductions in their budget. Family cases now only qualify is there is evidence of domestic violence. Whereas the criteria for eligibility for the areas of employment, education, immigration and housing have been greatly restricted. In relation specifically to housing, cases concerning homelessness will still be covered, but the steps that lead up to it are not.[20] Therefore, arguably the government are ignoring the reasons and problems that lead up to homelessness which will make it a more prominent issue and may well increase the amount of homelessness.[21] Overall, the budget cuts in legal aid removes the choice of individuals regarding how to defend themselves. Therefore their access to justice is severely limited.

The justifications for the civil legal aid cuts are, again, the fact that government spending needs to be reduced. Yet Lord McNally, the justice minister has argued that despite the reforms the government will still spend £1.7bn on legal aid a year.[22] The amount of opposition to the cuts

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17 C. Coleman, 'Legal aid: Criminal case cuts planned', *BBC News*, 5 March 2013 <www.bbc.co.uk/news/uk-21666224>.

18 M. Stobbs, 'Criminal legal aid: what now?', *The Law Gazette*, 10 April 2013 <www.lawgazette.co.uk/blogs/blogs/news-blogs/criminal-legal-aid-what-now>.

19 T. Whitehead, 'Legal aid cuts risks damaging civilised society, warns senior judge', *The Telegraph Newspaper*, 9 May 2013, <www.telegraph.co.uk/news/uknews/law-and-order/10047216/Legal-aid-cuts-risks-damaging-civilised-society-warns-senor-judge.html>.

20 BBC News 'Legal aid changes spark solicitor warnings,' *BBC Newspaper*, 1 April 2013, <www.bbc.co.uk/news/uk-21991945>.

21 O. Bowcott, 'Legal aid cuts 'will create advice deserts', *The Guardian Newspaper,* 1 April 2013, <www.guardian.co.uk/law/2013/apr/01/legal-aid-cuts>.

22 Bowcott 2013.

demonstrates the strong public and professional opinion that they are tantamount to a restriction of access to justice. However, the large financial deficit that the country is in is means that the government have had to make painful cuts, unfortunately this includes legal aid. Thus, the real question now is whether there are any viable alternatives.

Professionals have been quick to condemn the new system of legal aid, however, Lord Neuberger who himself is against the reforms, has stated that barristers and solicitors concentrate too much on complaining about the system, rather than offering alternative solutions.[23] There is an argument that this is because lawyers are more concerned with the financial implications for themselves, rather than ensuring access to justice.

In his article, Zuckerman argues that the cost of litigation is 'unpredictable, excessive and disproportionate.'[24] To support this, a survey found that the costs were excessive, especially in cases that were less serious. For example, with cases of a value less than £12,500, in 31% the costs to the successful party were between £10,000 and £20,000, with a further 9% incurring costs in excess of £20,000.[25] Thus supporting the theory that lawyers are exploiting the system for financial gain. Such unreasonable costs can be seen through the case of Symphony Group plc v Hodgson[26] which involved the issuing of a writ, securing an injunction, and obtaining a final judgement. The whole process took nine weeks and the cost for the plaintiff exceeded £100,000. Furthermore, the fact that both Barristers and Solicitors charge their services by the hour means that there is no incentive to economise the system.

Costly litigation impedes access to justice because clients are normally unaware and unable to protect themselves from such costs because the legal system is so complex. Lawyers are essential in order to deal with the legal procedure; and as such they have a monopoly over the entire system. Although the system does have many flaws, it could be argued that the system is at fault and not the lawyers. Indeed, the level of pro bono activity offered by lawyers does indicate the dedication of professionals of ensuring access to justice.

The cuts of legal aid and the fact that there is a strong incentive for lawyers to allow high costs to prevail means that there is a need for an alternative system. Mediation and arbitration act as this alternative. Mediation is a

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[23] T. Whitehead, 'Legal aid cuts risks damaging civilised society, warns senior judge', *The Telegraph Newspaper*, 9 May 2013, <www.telegraph.co.uk/news/uknews/law-and-order/10047216/Legal-aid-cuts-risks-damaging-civilised-society-warns-senor-judge.html>.

[24] Zuckerman 1996, p. 1.

[25] Zuckerman 1996 p. 2.

[26] Court of Appeal (Civil Division), 28 April 1993, *Symphony Group plc v Hodgson*, 4 All ER 143

process which allows individuals to have greater control over the outcome, rather than having to rely on lawyers. It is confidential and allows the parties to talk over their disputes in front of an impartial and independent third party. As such the process is quick, flexible and cost effective.[27] Mediation can be used in many areas, including issues regarding housing, but it still requires an understanding of the process and the need to be able to discuss and rationalise your case effectively. Therefore those who are most vulnerable, such as the illiterate, immigrants and the homeless are at a disadvantage and thus access to justice is still not achieved.

The budget cuts in legal aid have had a significant effect upon individual's access to justice. With so many restrictions now imposed and the fact that there is strong evidence that many lawyers are primarily concerned with financial gain means that people are forced to either represent themselves, or seek alternative systems. The government's proactive approach to mediation allows many to avoid the court system and the need for legal representation. However, it is far from perfect and as such the system provides many obstacles to achieving access to justice for all.

4 Discrimination against homeless people

Various charities have reported an increase in homelessness within the UK. For example, Shelter has estimated that there was a 12% increase of households with children that were accepted as homeless, with the total now being 34,080 in 2012.[28] As such it is important to appreciate the amount of discrimination that the homeless experience and investigate ways to change it.

The charity Crisis has raised concerns about some aspects of the Queen's recent speech. The speech involved measures for private landlords to perform immigration checks. Crisis consider this to be unworkable because it will result in landlords discriminating against anybody they even suspect of being an immigrant, thus anybody with a foreign-sounding name will be at risk.[29] This will act as an obstacle to access to justice because the power will ultimately lie with the landlords, and therefore the element of accountability will be missing.

One of the main elements of discrimination that homeless people experience is in relation to health. For example information regarding health

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[27] Her Majesty's Courts and Tribunals Service, *'Mediation and alternatives to court,'* 26 November 2013, <www.justice.gov.uk/courts/mediation>, last accessed on 01 December 2013.

[28] Shelter, '*Sharp rise in the number of homeless families,'* 22 March 2013, <england.shelter.org.uk/news/march_2013/sharp_rise_in_number_of_homeless_families>, last accessed 25 March 2013.

[29] Crisis, *'Crisis warns on immigration checks,'* 08 May 2013, <www.crisis.org.uk/news.php/647/crisis-warns-on-immigration-checks>, last accessed on 01 December 2013.

promotion is mostly in written form and English as a second language, learning disabilities and low levels of literacy are all common with the homeless. Therefore, health link have advocated the need to have health messages put forward in a way that does not rely on written English.[30] Furthermore, there is a need for a more accessible complaints procedure within the National Health Service to ensure access to justice. There needs to be recognition that many marginalised people, including the homeless, have difficulties in exercising their rights. The NHS is introducing a new complaints system that is aimed at providing greater transparency and impartiality. The new system will include that the GP (General Practitioner) is no longer able to say that the issue has been resolved; it will now be up to the complainant to say whether the matter is concluded.[31]

Additionally, if the complainant is dissatisfied with their initial response from the National Health Service (NHS), they will have the right to an independent review. This will be carried out by the independent Healthcare Commission, rather than simply another NHS institution. Subsequently, if the complainant is still unhappy with the result, they can take the matter further to the independent Health Service Ombudsman.[32] All of these initiatives are obviously beneficial, however it is recognised that the information regarding the complaints procedure needs to made readily available, and in a variety of mediums.

This is being achieved through various mechanisms. A system that is aimed at vulnerable groups per se is the Complaints Routing Project which produces information for patients that explains the complaints procedure in a very basic manner. Additionally, an initiative that is aimed exclusively at homeless people has been started by the charity Groundswell which provides services for both homeless people's peer advocacy and self-advocacy.[33] By having mechanisms in place that aim to eradicate firstly, parts of the system that allow for discrimination and secondly, ways in which vulnerable groups can combat discrimination ensures the maximum level of access to justice.

Research has also demonstrated that 10% of young people could progress in education but the fact that the system does not allow young people over the age of 19 to both study and claim benefits is discriminatory against the homeless.'[34] This highlights a national problem, which cannot be tackled through local or charitable means. It does not directly affect people's access to justice, but the more educated you are the better position

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30 S, Gorton & E, Manero, *Listening to Homeless People,* p. 11, <www.health-link.org.uk/publications/Listening_to_Homeless_People.pdf>, last accessed on 15 January 2012.

31 Gorton & Manero 2012 p. 15

32 Gorton & Manero 2012 p. 15

33 Groundswell, 'Homeless Health Peer Advocacy,' Website: <www.groundswell.org.uk/homeless-health-peer-advocacy.html>, last accessed on 17 December 201.3

34 Crisis, 'Access to mainstream public services for homeless people,' November 2005, p. 16.

you are in to resolve disputes in a formal situation, therefore highlighting how discrimination against the homeless can inadvertently affect access to justice.

However, there are some national Acts which aim to eliminate discrimination in multiple areas of society. The Equality Act 2010 and the Homelessness Act 2002 provides a general outline that prohibits discrimination. Yet, the local authorities are the bodies that have the greatest degree of power in housing related issues and these differ in different areas of the UK. It has been reported that there is a 'disappointing picture of performance' in England and Wales[35] relating to the level of services that are offered by local authorities. The reason behind the disparity and disappointing findings were explained by a Shelter report that found that one of the key problems was persuading councillors that homelessness is a problem that should be invested in, and changing the negative perception and stereotype that surrounds homeless people.[36] The solutions suggested consist primarily of improving understanding of the issue so that awareness is raised within society. The CAB offer support for homeless people within this area primarily through informing people of the mechanisms available to them and accessing them through the administrative process. Therefore, although there are statutory provisions in place that prohibit any form of discrimination, and the CAB offer support in this areas, research demonstrates that the key to resolving the issue is to improve social perception.

5 Conclusion

The notion of access to justice is diverse in its application. The work of charitable organisations such as the CAB demonstrates how for many individuals their only experiences in relation to justice are at the base level. Therefore the governmental support of these charities is vital in ensuring that justice is truly accessible. Subsequently the budget cuts that reduce the funding that the CAB receives is arguably an initiative that lacks logic. The financial deficit is obviously something that the government needs to address and modify, however by reducing both the scope of eligibility for individuals to receive legal aid and the amount that charitable organisations receive results in severe obstacles to achieving access to justice.

If the government focuses too heavily on saving money, then access to justice will be reduced until it is nothing more than an abstract concept. The social policy role of the CAB is not only a lobbying tactic, but is also a method

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[35] Audit Commission, 'Homelessness - Responding to the new agenda', January 2003, p. 3.

[36] Shelter, Local Authority Progress and Practice, 'Local Authorities and the Homelessness Act 2002 - the first year,' July 2003, p. 18.

of compromise for the government. If they listen to what organisations say will be the effect of the legislation then they are demonstrating that they are both interested and concerned with the potential impact. As such, reducing the funding indicates a blatant disregard for the effect that budget cut legislation is having on individual's access to justice.

Furthermore, in relation to the cuts in legal aid, the fact that so many people are now excluded from the remit of eligibility means that people are left without adequate representation. This is a restriction of access to justice at the most extreme level and results in deprivation of the right to a fair trial. I agree with the judgement of the ECHR in the case Airey v Ireland[37] in which Mrs Airey was denied legal aid for the civil matter of separation and the court concluded that it breached Article 6 ECHR. This is because the case was complex in subject-matter, consisted of a difficult legal procedure and concerned an emotive issue. Thus she was not able to properly represent herself and her access to justice was restricted. This indicates a long standing principle that the courts will not abide restrictions of access to justice. The increase of plaintiffs that are being forced to either not proceed with their case or represent themselves means that the court will likely be seeing an increase of cases concerning this issue, and case law implies that the ECHR will not sympathise with the government's financial reasoning. Therefore, to avoid such embarrassing judgements the government needs to reassess its initial plan and either needs to invest in more legal aid for individuals, or more charitable organisations that can help individuals. To cut both systems results in a double barrier to access to justice, something which cannot be justified convincingly.

Finally, the evidence highlights the manner in which homeless people are being discriminated in more general areas such as education and health. This is a particularly dangerous situation because it means that people will not be in a position to fight for their right to access to justice effectively. The lack of further education means that the legal procedure will seem more complicated and daunting, and the discrimination in the realm of healthcare highlights the social barriers that the homeless experience. The NHS is intended to be from 'the cradle to the grave[38]' and if people are not being granted this right on the basis that the homeless are not perceived as important in society then it demonstrates the social stigma that they experience. The local authority approach also reveals the social obstacles that result in an inadvertent barrier to justice. Thus the only way to improve the situation is through education and raising awareness. This would preferably be done at an early age in order to ensure that the next generation can challenge the existing perception and also be instrumental in affecting change.

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[37] ECHR, 06 February 1981, Airey v Ireland, 3.E.H.R.R. 592,

[38] Sir W. Beveridge, *The Beveridge Report,* The National Archives 1942 <www.nationalarchives.gov.uk/pathways/citizenship/brave_new_world/welfare.htm>.

Overall, the notion of access to justice is complicated and multi-layered and yet everybody should be able to represent their case, fight injustices and establish their rights at whatever level necessary. Unfortunately the recent legal aid cuts have made this ever more difficult, which should not be the case in a strong, democratic country. The only way to rectify this is for the government to alter its policies, however with governmental U-turns seen as a weakness it is very possible that access to justice will be restricted in fear of political embarrassment. In addition, discrimination against the homeless and vulnerable groups is found in many areas and the only way to combat it is through education. This is a less controversial suggestion but is arguably still problematic as it will require nationwide strategies which are both costly and difficult to implement. As such, access to justice is currently in a state of limbo. As time progresses we will see in what form the concept survives, whether it strengthens in the face of adversity or whether it is dwindles to become more of an abstract rather than practical right.

Chapter 16
Homelessness and Access to Justice in the Netherlands

Rieneke Roorda

1 Introduction

According to international treaties such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESC) and the European Social Charter (ESC) everyone has the right to 'an adequate standard of living for himself and his family'. This includes the right to housing or shelter. To realise this right the aforementioned treaties impose an obligation on the state to take 'appropriate steps to ensure the realization of this right'.[1]

Although in theory all persons have a right to protection, it does not always work out this way in practice. Recent research in the Netherlands shows there are homeless people who for various reasons are denied access to shelter.[2] This observation gives rise to the question of whether it is indeed possible for homeless people to exercise their right to protection at all. Can homeless people access justice? This chapter aims answer to these questions with reference to the research question: 'to what extent do the conditions governing access to justice cause a problem when invoking the right to protection?'

In the next paragraph this chapter describes the situation of homeless people within the Dutch legal system. The paragraph compares the system 'on paper' and the system 'in practice'. The third paragraph discusses two definitions of the concept 'access to justice'. The fourth paragraph examines whether the situation regarding the right to protection in the Netherlands is in line with these two definitions of access to justice.

2 The legal framework of social care for homeless people in the Netherlands

Although the provisions in the UDHR, the ICESC and the ESC cannot be invoked by individuals, they do impose an obligation on member states to take appropriate steps to ensure the realisation of the right to an adequate

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1 Art. 25 UDHR; art. 11 (1) ICESCR; art. 31 ESC.

2 M. Tuynman, C. Muusse, M. Planije, Opvang landelijk toegankelijk? Onderzoek naar regiobinding en landelijke toegankelijkheid van de maatschappelijke opvang, 2013, p. 9.

standard of living.[3] In the Netherlands this duty of care has been delegated by the national government to 43 municipalities.[4] According to the *Wet maatschappelijke ondersteuning* (Dutch Social Support Act (WMO)) these municipalities are responsible for the availability of temporary shelter, counselling and information for persons who have left their domestic situation (whether or they were forced to do so) and who are unable to survive alone in society.[5]

Although the municipality is responsible for the availability of shelter, the execution of this task (the actual provision of shelter) should be placed as much as possible in the hands of one or several third parties.[6] However, this does not mean that the municipality can delegate the decision-making process to the third party. In its judgement on 15 April 2010 the *Afdeling Bestuursrechtspraak Raad van State* (Dutch Supreme Court in administrative proceedings (ABRvS) ruled that a distinction should be made between the actual provision of shelter and the process of assessing whether a person is or is not eligible for shelter. The latter falls within the scope of the duty of care and is therefore the responsibility of the municipalities.

Theory and practice differ on this point. While it is the municipality that should assess whether or not a homeless person is eligible for shelter, a recent study by the Dutch Trimbos Institute shows that in practice this decision is often taken by staff at the homeless shelter.[7] This runs the risk of arbitrariness and too much 'power' in the hands of staff at the homeless shelter. In practice it could result in homeless people with the same background and submitting the same request being treated differently by the same homeless shelter.[8]

Another consequence of this difference between theory and practice concerns the variation in decision-making procedures that has arisen between municipalities. For example, in the city of Rotterdam, a homeless person has to go to the municipality in order to obtain a decision about shelter, while in the city of Leeuwarden a homeless person has to go to one of the different organizations that provide shelter in order to obtain such a decision. This variation between municipalities leads to a difference in legal procedures on the point of access to the court. If a homeless person wants to appeal against a decision taken by the municipality, he has to do so under administrative law. If, on the other hand, the homeless person wants to appeal against a decision taken by the homeless shelter, he does so under civil law.

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3 Art. 25 UDHR; art. 11 (1) ICESCR; art. 31 ESC.

4 Art. 20 (1) WMO.

5 Art. 1 (1) sub c WMO & Federatie Opvang, Factsheet. Kerngegevens maatschappelijke opvang, 2013.

6 Art. 10 WMO.

7 Tuynman, Muuse & Planije 2013, p. 35 & 36.

8 Tuynman, Muuse & Planije 2013, p. 20.

There are a few more observations made by the Trimbos Institute that should be mentioned in this article. The study shows, for example, that the grounds for denying shelter are not in every case clear. There are cases where on appeal shelter is again denied, however on different grounds. Another important finding of the study is the use of the 'no access-unless' criterion by some municipalities. This criterion implies that the homeless person requesting shelter has to prove he has a right to protection.[9]

At this stage in the chapter we can provisionally conclude that the situation of homeless people within the Dutch legal system as regards social care is not clear-cut. There is a difference between the system on paper and the system in practice. The chapter now goes on to address the question of whether the system is in line with the definitions of the concept 'access to justice'.

3 Access to justice

We discuss two definitions of the concept 'access to justice'. The first definition can be found in Article 6 of the European Convention on Human Rights (ECHR). This article contains the fundamental right of access to an impartial and independent legal institution.[10] Over the years the jurisprudence around Article 6 ECHR has become extensive. The criterion formulated by the European Court on Human Rights (the Court) in its judgement 'De Geouffre de la Pradelle' seems relevant in this case. In the 'De Geouffre de la Pradelle' case the Court decided that the system of access to the court should be sufficiently coherent and clear.[11]

The second definition of access to justice is formulated by the United Nations Development Programme (UNDP):

> 'Access to justice can be defined as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.'[12]

This definition seems to imply more than just the right of access to the court as can be derived from Article 6 ECHR. It applies to the entire process embarked upon by the homeless person who is trying to realise his right to

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9 Tuynman, Muuse & Planije 2013, p. 45.

10 R.J.N. Schlössels & S.E. Zijlstra, *Onderwijseditie Bestuursrecht in de sociale Rechtsstaat*, Deventer, Kluwer, 2010, p. 292. & ECHR 21 February 1975, Case of Golder v. the United Kingdom, 4451/70.

11 ECHR 16 December 1992, Case of De Geouffre de la Pradelle v. France, 12964/87.

12 UNDP Justice System Programme, Access to Justice Concept Note, February 2011. Anna Willis also uses this definition her contribution in this volume.

protection. According to the definition of the UNDP, access to justice starts with the staff of the homeless shelter or the municipality taking the decision as to whether or not to grant shelter.

4 Access to justice for homeless people in the Netherlands

This paragraph examines whether the situation regarding the right to protection is in line with the two definitions of access to justice. When the current situation is reviewed in the light of Article 6 ECHR, focus should be placed on the Court's ruling in 'De Geouffre de la Pradelle' case. While the (general) fundamental right of access to an impartial and independent legal institution is not violated (there is access to the administrative or the civil court), the question remains whether the system is sufficiently coherent and clear with regard to access to the court.

This does not seem to be the case. Despite the fact that the ABRvS has ruled that the decision-making process lies within the responsibility of the municipality, in practice it is often the staff of the homeless shelter who decides whether or not to grant shelter. This has led to a difference in the policies of the municipalities and has resulted in two different legal procedures; that under administrative law and that under civil law. This does not make the system sufficiently coherent and clear, especially when we consider the fact that homeless people are a vulnerable group, generally speaking without extensive legal knowledge.

When the situation regarding the right to protection is reviewed in the light of the definition of the United Nations Development Programme we need to look at the entire process followed by a homeless person seeking to exercise his right to protection. Here the risk of arbitrariness is problematic in relation to the criteria of 'a fair response' and 'control on the abuse of power' referred to in the definition of the UNDP. In cases where the grounds for refusal are not clear problems arise in relation to the criterion of a 'transparent and efficient process'. The use of the 'no access-unless' criterion by some municipalities seems the most problematic of all. This criterion does not relate to the vulnerable position of homeless people and it does not seem to be a 'quick, effective and fair response' to safeguard the right of homeless people to protection.

5 Conclusion

The central question in this chapter is: 'to what extent do the conditions governing access to justice cause a problem when invoking the right to protection'. In answering this question a choice must be made between two definitions of the concept 'access to justice'. It seems however, that whatever the definition the Dutch government still has a long way to go.

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